COUNCIL ON ENVIRONMENTAL QUALITY

40 CFR Parts 1500, 1501, 1502, 1503, 1504, 1505, 1507, and 1508

[CEQ–2019–0003]

RIN 0331–AA03

Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

AGENCY: Council on Environmental Quality.

ACTION: Notice of proposed rulemaking.

SUMMARY: In this action, the Council on Environmental Quality (CEQ) is proposing to update its regulations for implementing the procedural provisions of the National Environmental Policy Act (NEPA). CEQ has not comprehensively updated its regulations since their promulgation in 1978, more than four decades ago. This proposed rule would modernize and clarify the regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies in connection with proposals for agency action. The proposed amendments would advance the original goals of the CEQ regulations to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA. If finalized, the proposed rule would comprehensively update and substantially revise the 1978 regulations. CEQ invites comments on the proposed revisions.

DATES: CEQ must receive comments by March 10, 2020. CEQ will hold public hearings on the following dates:

1. February 11, 2020, U.S. Environmental Protection Agency Region 8, 1595 Wynkoop Street, Denver, CO.

2. February 25, 2020, U.S. Department of the Interior, Yates Auditorium, 1849 C Street NW, Washington, DC.

All attendees or speakers must register in advance. Details concerning the hearings and information on additional outreach may be found at *www.nepa.gov* and *www.whitehouse.gov/ceq*.

ADDRESSES: You may submit comments, identified by docket number CEQ–2019–0003, by any of the following methods:

- *Federal eRulemaking Portal: https://www.regulations.gov*. Follow the instructions for submitting comments.
- *Fax:* 202–456–6546.
- *Mail:* Council on Environmental Quality, 730 Jackson Place NW, Washington, DC 20503.

Instructions: All submissions received must include the agency name and docket number for this rulemaking. All comments received will be posted without change to *https://www.regulations.gov,* including any personal information provided. Do not submit electronically any information you consider to be private, Confidential Business Information (CBI), or other information whose disclosure is restricted by statute.

Docket: For access to the docket to read background documents or comments received, go to *https://www.regulations.gov.*

FOR FURTHER INFORMATION CONTACT: Edward A. Boling, Associate Director for the National Environmental Policy Act, or Viktoria Z. Seale, Chief of Staff and General Counsel, 202–395–5750, *NEPA-Update@ceq.eop.gov.*

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Background

The National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.,* (NEPA) was signed into law by President Nixon on January 1, 1970. The Council on Environmental Quality (CEQ) initially issued guidelines for implementing NEPA in 1970, revised those guidelines in 1973, and subsequently promulgated its NEPA implementing regulations in 1978. The original goals of those regulations were to reduce paperwork and delays, and promote better decisions consistent with the national environmental policy established by the Act.

Since their promulgation, however, there has been a need for clarification of the regulations, and CEQ has issued over 30 guidance documents to assist

Federal agencies in complying with NEPA and the CEQ regulations. Courts also have issued numerous decisions addressing appropriate implementation and interpretation of NEPA and the CEQ regulations, resulting in a large body of case law. Additionally, Presidential directives have been issued and legislation has been enacted to reduce delays and expedite the implementation of NEPA and the CEQ regulations, including for certain types of infrastructure projects. Notwithstanding the issuance of guidance, Presidential directives, and legislation, implementation of NEPA and the CEQ regulations can be challenging, and the process can be lengthy, costly, and complex. In some cases, the NEPA process and related litigation has slowed or prevented the development of new infrastructure and other projects that required Federal permits or approvals.

The background section below summarizes NEPA, the CEQ regulations, and developments since CEQ issued those regulations. Specifically, section I.A provides a brief summary of the NEPA statute. Section I.B describes the history of CEQ's regulations implementing NEPA and provides an overview of CEQ's numerous guidance documents and reports issued subsequent to the regulations. Section I.C discusses the role of the courts in interpreting NEPA. Section I.D provides a brief overview of Congress's efforts, and section I.E describes the initiatives of multiple administrations to reduce delays and improve implementation of NEPA. Finally, section I.F provides the background on this rulemaking, including the advance notice of proposed rulemaking (ANPRM).

In section II, CEQ provides a summary of the proposed rule, which, if finalized, would comprehensively update and substantially revise CEQ's current regulations. This proposed rule would modernize and clarify the CEQ regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies by simplifying regulatory requirements, codifying certain guidance and case law relevant to these proposed regulations, revising the regulations to reflect current technologies and agency practices, eliminating obsolete provisions, and improving the format and readability of the regulations. CEQ's proposed revisions include provisions intended to promote timely submission of relevant information to ensure consideration of such information by agencies. CEQ's proposed revisions also are intended to provide greater clarity for Federal agencies, States, Tribes, localities, and the public, and to advance the original goals of the CEQ regulations to reduce paperwork and delays and to promote better decisions consistent with the national environmental policy set forth in section 101 of NEPA.

A. National Environmental Policy Act (NEPA)

Congress enacted NEPA to establish a national policy for the environment, provide for the establishment of CEQ, and for other purposes. Section 101 of NEPA sets forth a national policy ''to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.'' 42 U.S.C. 4331(a). Section 102 of NEPA establishes procedural requirements, applying that national policy to proposals for major Federal actions significantly affecting the quality of the human environment by requiring Federal agencies to prepare a detailed statement on: (1) The environmental impact of the proposed action; (2) any adverse effects that cannot be avoided; (3) alternatives to the proposed action; (4) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and (5) any irreversible and irretrievable commitments of resources that would be involved in the proposed action. 42 U.S.C. 4332(2)(C). NEPA also established CEQ as an agency within the Executive Office of the President to administer Federal agency implementation of NEPA. 42 U.S.C. 4342, 4344; *see also Dep't of Transp.* v. *Pub. Citizen,* 541 U.S. 752, 757 (2004).

NEPA does not mandate particular results or substantive outcomes. Rather, NEPA requires Federal agencies to consider environmental impacts of proposed actions as part of agencies' decision-making processes. Additionally, NEPA does not include a private right of action and specifies no remedies. Challenges to agency action alleging non-compliance with NEPA procedures are brought under the Administrative Procedure Act (APA). 5 U.S.C. 551 *et seq.* Accordingly, NEPA cases proceed as APA cases.

B. Council on Environmental Quality (CEQ) Regulations, Guidance, and Reports

1. Regulatory History

In 1970, President Nixon issued Executive Order (E.O.) 11514, titled ''Protection and Enhancement of Environmental Quality,'' which directed CEQ to ''[i]ssue guidelines to Federal agencies for the preparation of detailed statements on proposals for legislation and other Federal actions affecting the environment, as required by section 102(2)(C) of the Act.'' [1] CEQ issued these guidelines in April of 1970 and revised them in 1973.[2]

In 1977, President Carter issued E.O. 11991, titled ''Relating to Protection and Enhancement of Environmental Quality.'' [3] E.O. 11991 amended section 3(h) of E.O. 11514, directing CEQ to ''[i]ssue regulations to Federal agencies for the implementation of the procedural provisions of [NEPA] . . . to make the environmental impact statement process more useful to decision[ ]makers and the public; and to reduce paperwork and the accumulation of extraneous background data, in order to emphasize the need to focus on real environmental issues and alternatives,'' and to ''require [environmental] impact statements to be concise, clear, and to the point, and supported by evidence that agencies have made the necessary environmental analyses.'' E.O. 11991 also amended section 2 of E.O. 11514, requiring agency compliance with the regulations issued by CEQ.

In 1978, CEQ promulgated its ''Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act,'' 40 CFR parts 1500–1508 (''CEQ regulations'' or ''NEPA regulations''), ''[t]o reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment.'' [4] The Supreme Court has afforded the CEQ regulations ''substantial deference.'' *Robertson* v. *Methow Valley Citizens Council,* 490 U.S. 332, 374 (1989) (citing *Andrus* v. *Sierra Club,* 442 U.S. 347, 358 (1979)); *see also Pub. Citizen,* 541 U.S. at 757 (''The [CEQ], established by NEPA with authority to issue regulations

[1] 35 FR 4247 (Mar. 7, 1970), § 3(h).

[2] *See* 35 FR 7391 (May 12, 1970) (interim guidelines); 36 FR 7724 (Apr. 23, 1971) (final guidelines); 38 FR 10856 (May 2, 1973) (proposed revisions to guidelines); 38 FR 20550 (Aug. 1, 1973) (revised guidelines).

[3] 42 FR 26967 (May 25, 1977).

[4] 43 FR 55978 (Nov. 29, 1978); *see also* 44 FR 873 (Jan. 3, 1979) (technical corrections), and 43 FR 25230 (June 9, 1978) (proposed rule).

interpreting it, has promulgated regulations to guide [F]ederal agencies in determining what actions are subject to that statutory requirement.'' (citing 40 CFR 1500.3)); *United States* v. *Mead Corp.,* 533 U.S. 218, 227–30 (2001) (properly promulgated agency interpretative regulations addressing ambiguities or gaps in a statute qualify for *Chevron* deference); *Nat'l Cable & Telecomm. Ass'n* v. *Brand X Internet Servs.,* 545 U.S. 967, 980–81 (2005) (applying *Chevron* deference to Federal Communications Commission regulations).

The Supreme Court has held that NEPA is a procedural statute that serves the twin aims of ensuring that agencies consider the significant environmental consequences of their proposed actions and inform the public about their decision making. *Balt. Gas & Elec. Co.* v. *Nat. Res. Def. Council, Inc.,* 462 U.S. 87, 97 (1983) (citing *Vt. Yankee Nuclear Power Corp.* v. *Nat. Res. Def. Council, Inc.,* 435 U.S. 519, 553 (1978); *Weinberger* v. *Catholic Action of Haw./Peace Educ. Project,* 454 U.S. 139, 143 (1981)). Furthermore, in describing the role of NEPA in agencies' decision-making processes, the Supreme Court has stated, ''Congress in enacting NEPA, however, did not require agencies to elevate environmental concerns over other appropriate considerations.'' [5] *Balt. Gas & Elec. Co.,* 462 U.S. at 97 (citing *Strycker's Bay Neighborhood Council* v. *Karlen,* 444 U.S. 223, 227 (1980) (per curiam)). Instead, NEPA requires agencies to analyze the environmental consequences before taking a major Federal action. *Id.* (citing *Kleppe* v. *Sierra Club,* 427 U.S. 390, 410 n.21 (1976)). The Supreme Court has recognized that agencies have limited time and resources and that ''[t]he scope of the agency's inquiries must remain manageable if NEPA's goal of '[insuring] a fully informed and well-considered decision,' . . . is to be accomplished.'' *Metro. Edison Co.* v. *People Against Nuclear Energy,* 460 U.S. 766, 776 (1983) (quoting *Vt. Yankee,* 435 U.S. at 558).

CEQ has substantively amended its NEPA regulations only once, at 40 CFR 1502.22, to replace the ''worst case'' analysis requirement with a provision for the consideration of incomplete or unavailable information regarding reasonably foreseeable significant adverse effects.[6] CEQ found that the new 40 CFR 1502.22 ''will generate information and discussion on those consequences of greatest concern to the public and of greatest relevance to the agency's decision,'' [7] rather than distorting the decision-making process by overemphasizing highly speculative harms.[8] The Supreme Court found this reasoning to be a well-considered basis for the change, and that the new regulation was entitled to substantial deference. *Methow Valley,* 490 U.S. at 356.

The CEQ regulations direct Federal agencies to adopt their own implementing procedures to supplement the NEPA regulations. 40 CFR 1507.3. Under this regulation, agencies across the Federal Government have developed such procedures.[9]

2. CEQ Guidance and Reports

Over the past four decades, numerous questions have been raised regarding appropriate implementation of NEPA and the CEQ regulations. Soon after the issuance of the CEQ regulations and in response to CEQ's review of NEPA implementation and feedback from Federal, State, and local officials, including NEPA practitioners, CEQ issued the ''Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations'' [10] in 1981 (''Forty Questions''). This guidance covered a wide range of topics including alternatives, coordination among applicants, lead and cooperating agencies, and integration of NEPA documents with analysis for other environmental statutes. In addition, CEQ has periodically examined the effectiveness of the NEPA process and issued a number of reports on NEPA implementation. In some instances, these reports led to additional guidance. These documents have been intended to provide guidance and clarifications with respect to various aspects of the implementation of NEPA and the definitions in the CEQ regulations, and to increase the efficiency and effectiveness of the environmental review process.[11]

In January 1997, CEQ issued ''The National Environmental Policy Act: A Study of Its Effectiveness After Twenty-five Years.'' [12] In that report, CEQ acknowledged that NEPA has ensured that agencies adequately analyze the potential environmental consequences of their actions and bring the public into the decision-making processes of Federal agencies. However, CEQ also identified matters of concern to participants in the study, including concerns with overly lengthy documents that may not enhance or improve decision making,[13] and concerns that agencies may seek to '' 'litigation-proof' documents, increasing costs and time but not necessarily quality.'' [14] The report further stated that ''[o]ther matters of concern to participants in the Study were the length of NEPA processes, the extensive detail of NEPA analyses, and the sometimes confusing overlay of other laws and regulations.'' [15] The participants in the study identified five elements of the NEPA process' collaborative framework (strategic planning, public information and input, interagency coordination, interdisciplinary place-based decision making, and science-based flexible management) as critical to effective and efficient NEPA implementation.

In 2002, the Chairman of CEQ established a NEPA task force, composed of Federal agency officials, to examine NEPA implementation by focusing on (1) technology and information management and security; (2) Federal and intergovernmental collaboration; (3) programmatic analyses and tiering; (4) adaptive management and monitoring; (5) categorical exclusions (CEs); and (6) environmental assessments (EAs). In 2003, the task force issued a report [16] recommending actions to improve and modernize the

[5] Section 101 of NEPA provides that it is the Federal Government's policy ''to use all practicable means and measures . . . to create and maintain conditions under which man and natures can exist in productive harmony, and *fulfill the social, economic, and other requirements of present and future generations of Americans.*'' 42 U.S.C. 4331(a) (emphasis added).

[6] 51 FR 15618 (Apr. 25, 1986).

[7] 50 FR 32234, 32237 (Aug. 9, 1985).

[8] 51 FR 15618, 15620 (Apr. 25, 1986).

[9] A list of agency NEPA procedures is available at *https://ceq.doe.gov/laws-regulations/agency_implementing_procedures.html.*

[10] 46 FR 18026 (Mar. 23, 1981), *https://www.energy.gov/nepa/downloads/forty-most-asked-questions-concerning-ceqs-national-environmental-policy-act.*

[11] *See https://ceq.doe.gov/guidance/guidance.html.*

[12] *https://ceq.doe.gov/docs/ceq-publications/nepa25fn.pdf.*

[13] *Id.* at iii.

[14] *Id.*

[15] *Id.* In the 50 years since the passage of NEPA, Congress has amended or enacted a number of other environmental laws that may also apply to proposed Federal agency actions, such as the Endangered Species Act, the Clean Water Act, the Clean Air Act, and other substantive statutes. *See* discussion *infra* section I.D. Consistent with 40 CFR 1502.25, longstanding agency practice has been to use the NEPA process as the umbrella procedural statute, integrating compliance with these laws into the NEPA review and discussing them in the NEPA document. However, this practice sometimes leads to confusion as to whether analysis is done to comply with NEPA or another, potentially substantive, environmental law.

[16] *See* The NEPA Task Force Report to the Council on Environmental Quality, Modernizing NEPA Implementation (Sept. 2003) (''NEPA Task Force Report''), *https://ceq.doe.gov/docs/ceq-publications/report/finalreport.pdf.*

NEPA process, leading to additional guidance documents and handbooks.

Over the past 4 decades, CEQ has issued over 30 documents to provide guidance and clarifications to assist Federal agencies to more efficiently and effectively implement NEPA. CEQ has issued guidance on such topics as CEs,[17] EAs, mitigation, and findings of no significant impact (FONSIs),[18] emergencies,[19] programmatic NEPA reviews,[20] timely environmental reviews,[21] collaboration and conflict resolution,[22] purpose and need,[23] effects,[24] lead and cooperating agencies, environmental justice,[25] and other topics.[26]

Despite CEQ guidance and regulations providing for concise, timely documents, the documentation and timelines for completing environmental reviews can be very lengthy, and the process can be complex and costly. In 2018, CEQ and the Office of Management and Budget (OMB) issued a memorandum titled ''One Federal Decision Framework for the Environmental Review and Authorization Process for Major Infrastructure Projects under E.O. 13807'' (''OFD Framework Guidance'').[27] CEQ and OMB issued this guidance pursuant to E.O. 13807, titled ''Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects,'' [28] to improve agency coordination for infrastructure projects requiring an environmental impact statement (EIS) and permits or other authorizations from multiple agencies and to improve the timeliness of the environmental review process. *See* E.O. 13807, *infra* I.D. Consistent with the OFD Framework Guidance, *supra* note 27, Federal agencies signed a memorandum of understanding committing to implement the One Federal Decision (OFD) policy for major infrastructure projects, including by committing to establishing a joint schedule for such projects, preparation of a single EIS and joint record of decision (ROD), elevation of delays and dispute resolution, and setting a goal of completing environmental reviews for such projects within 2 years.[29] Subsequently, CEQ and OMB issued guidance for the Secretary of Transportation regarding the applicability of the OFD policy to States under the Surface Transportation Project Delivery Program,[30] and for the Secretary of Housing and Urban Development (HUD) regarding the applicability of the OFD policy to entities assuming HUD environmental review responsibilities.[31]

3. Environmental Impact Statement (EIS) Timelines and Page Count Reports

CEQ also has conducted reviews and prepared reports on the length of time it takes for agencies to prepare EISs and the length of these documents. These reviews found that the process for preparing EISs is taking much longer than CEQ advised, and that the documents are far longer than the CEQ regulations and guidance recommended. In December 2018, CEQ issued a report compiling information relating to the timelines for preparing EISs during the period of 2010–2017. While CEQ's Forty Questions states that the time for an EIS, even for a complex project, should not exceed 1 year,[32] CEQ found that, across the Federal Government, the average time for completion of an EIS and issuance of a ROD was over 4.5 years and the median was 3.6 years.[33] One quarter of the EISs took less than 2.2 years, and one quarter of the EISs took more than 6 years.

As reflected in that report, the period from publication of a notice of intent (NOI) to prepare an EIS to the notice of availability of the draft EIS took, on average, 58 percent of the total time, while preparing the final EIS, including addressing comments received on the draft EIS, took, on average, 32 percent of the total time. The period from the final EIS to publication of the ROD took, on average, 10 percent of the total time. This report recognized that EIS timelines vary widely, and many factors may influence the timing of the document, including variations in the scope and complexity of the actions, variations in the extent of work done prior to issuance of the NOI, and suspension of EIS activities due to external factors.

Additionally, in July 2019, CEQ issued a report on the length, by page

[17] *See* Council on Environmental Quality, Final Guidance for Federal Departments and Agencies on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act, 75 FR 75628 (Dec. 6, 2010) (''CE Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/NEPA_CE_Guidance_Nov232010.pdf* (clarifies the rules for establishing, applying, and revising CEs, including methods for substantiating CEs and the process to establish new CEs in agency NEPA procedures).

[18] *See* Final Guidance for Federal Departments and Agencies on the Appropriate Use of Mitigation and Monitoring and Clarifying Appropriate Use of Mitigated Findings of No Significant Impact, 76 FR 3843 (Jan. 21, 2011) (''Mitigation Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Mitigation_and_Monitoring_Guidance_14Jan2011.pdf* (explains the requirements of NEPA and the NEPA regulations on establishing, implementing, and monitoring mitigation commitments identified and analyzed in EAs, environmental impact statements (EISs), and adopted in decision documents).

[19] *See* Emergencies and the National Environmental Policy Act (''Emergencies Guidance''), *https://ceq.doe.gov/docs/nepa-practice/Emergencies_and_NEPA.pdf*.

[20] *See* Effective Use of Programmatic NEPA Reviews (Dec. 18, 2014) (''Programmatics Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Effective_Use_of_Programmatic_NEPA_Reviews_Final_Dec2014_searchable.pdf*.

[21] *See* Final Guidance on Improving the Process for Preparing Efficient and Timely Environmental Reviews Under the National Environmental Policy Act, 77 FR 14473 (Mar. 12, 2012) (''Timely Environmental Reviews Guidance''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/Improving_NEPA_Efficiencies_06Mar2012.pdf* (clarifies and emphasizes tools in the NEPA regulations for preparing efficient and timely environmental reviews for both EAs and EISs).

[22] *See* Memorandum on Environmental Conflict Resolution (Nov. 28, 2005), as expanded by Memorandum on Environmental Collaboration and Conflict Resolution (Sept. 7, 2012), *https://ceq.doe.gov/nepa-practice/environmental-collaboration-and-conflict-resolution.html* (supports constructive and timely approaches to resolve conflicts over the use, conservation, and restoration of the environment, natural resources, and public lands, including under NEPA).

[23] *See* Letter from the Hon. James L. Connaughton, Chairman, Council on Environmental Quality, to the Hon. Norman Y. Mineta, Secretary, Department of Transportation (May 12, 2003) (''Connaughton Letter''), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/CEQ–DOT_PurposeNeed_May-2013.pdf*.

[24] *See* Considering Cumulative Effects Under the National Environmental Policy Act (Jan. 1997), *https://ceq.doe.gov/publications/cumulative_effects.html*.

[25] *See* Environmental Justice: Guidance under the National Environmental Policy Act (Dec. 10, 1997), *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ej/justice.pdf*.

[26] *See, e.g.,* Forty Questions, *supra* note 10; NEPA and NHPA: Handbook for Integrating NEPA and Section 106 Reviews, *https://ceq.doe.gov/publications/nepa-handbooks.html* (clarifies and emphasizes tools in the NEPA regulations for preparing efficient and timely environmental reviews for both EAs and EISs); A Citizen's Guide to the NEPA: Having Your Voice Heard, *https://ceq.doe.gov/get-involved/citizens_guide_to_nepa.html*.

[27] M–18–13 (Mar. 20, 2018), *https://www.whitehouse.gov/wp-content/uploads/2018/04/M-18-13.pdf*.

[28] 82 FR 40463 (Aug. 24, 2017).

[29] *See* Memorandum of Understanding Implementing One Federal Decision under Executive Order 13807 (2018), *https://www.whitehouse.gov/wp-content/uploads/2018/04/MOU-One-Federal-Decision-m-18–13-Part-2–1.pdf*.

[30] Guidance on the Applicability of E.O. 13807 to States with NEPA Assignment Authority Under the Surface Transportation Project Delivery Program (Feb. 26, 2019), *https://www.whitehouse.gov/wp-content/uploads/2017/11/20190226OMB-CEQ327.pdf*.

[31] Guidance on the Applicability of E.O. 13807 to Responsible Entities Assuming Department of Housing and Urban Development Environmental Review Responsibilities, M–19–20 (June 28, 2019), *https://www.whitehouse.gov/wp-content/uploads/2019/06/M–19–20.pdf*.

[32] Question 35, Forty Questions, *supra* note 10.

[33] *See* Council on Environmental Quality, Environmental Impact Statement Timelines (2010–2017), (Dec. 14, 2018), *https://ceq.doe.gov/nepa-practice/eis-timelines.html*.

count, of EISs (excluding appendices) finalized during the period of 2013–2017. While the CEQ regulations include recommended page limits for the text of final EISs of normally less than 150 pages, or normally less than 300 pages for proposals of ''unusual scope or complexity,'' 40 CFR 1502.7, CEQ found that many EISs are significantly longer. In particular, CEQ found that across all Federal agencies, draft EISs averaged 586 pages in total, with a median document length of 403 pages.[34] One quarter of the draft EISs were 288 pages or shorter, and one quarter were 630 pages or longer. For final EISs, the mean document length was 669 pages, and the median document length was 445 pages. One quarter of the final EISs were 299 pages or shorter, and one quarter were 729 pages or longer. On average, the change in document length from draft EIS to final EIS was an additional 83 pages or a 14 percent increase.

With respect to final EISs, CEQ found that approximately 7 percent were 150 pages or shorter, and 25 percent were 300 pages or shorter. Similar to the conclusions of its EIS timelines study, CEQ noted that a number of factors may influence the length of EISs, including variation in scope and complexity of the decisions that the EIS is designed to inform, the degree to which NEPA documentation is used to document compliance with other statutes, and considerations relating to potential legal challenges. Moreover, variation in EIS length may reflect differences in management, oversight, and contracting practices among agencies that could result in longer documents.

While there can be many factors affecting the timelines and length of EISs, CEQ has concluded that revisions to the CEQ regulations to advance more timely reviews and reduce unnecessary paperwork are warranted. CEQ has determined that improvements to agency processes, such as improved coordination in the development of EISs, can achieve more useful and timely documents to support agency decision making.

C. Judicial Review of Agency NEPA Compliance

Over the past 50 years, Federal courts have issued an extensive body of case law interpreting NEPA and the CEQ regulations. The Supreme Court has directly addressed NEPA in 17 decisions, and the U.S. district and appellate courts issue approximately 100 to 140 decisions each year interpreting NEPA. The Supreme Court has construed NEPA and the CEQ regulations in light of a ''rule of reason,'' which ensures that agencies determine whether and to what extent to prepare an EIS based on the usefulness of information to the decision-making process. *See Marsh* v. *Or. Nat. Res. Council,* 490 U.S. 360, 373–74 (1989). ''Although [NEPA] procedures are almost certain to affect the agency's substantive decision, it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process.'' *Methow Valley,* 490 U.S. at 350; *Pub. Citizen,* 541 U.S. at 756–57 (''NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.'' (citing *Methow Valley,* 490 U.S. at 349–50)). The extensive body of case law interpreting NEPA and the current CEQ regulations drives much of agencies' modern day practice. A challenge for agencies is that courts have interpreted key terms and requirements differently, adding to the complexity of environmental reviews. As discussed below, the proposed regulations would codify longstanding case law in some instances, and, in other instances, clarify the meaning of the regulations where there is a lack of uniformity in judicial interpretation of NEPA and the CEQ regulations.

D. Statutory Developments

Following enactment of NEPA in 1970 and over the past four decades, Congress has amended or enacted a large number of substantive environmental statutes. These have included significant amendments to the Clean Water Act and Clean Air Act, establishment of new Federal land management standards and planning processes for National forests, public lands, and coastal zones, and statutory requirements to conserve fish, wildlife, and plant species.[35] Additionally, the consideration of the effects on historic properties under the National Historic Preservation Act is typically integrated into the NEPA review.[36] NEPA has served as the umbrella procedural statute, integrating these laws into NEPA reviews and discussing them in NEPA documents.

Over the past two decades and multiple administrations, Congress has also undertaken efforts to facilitate more efficient environmental reviews by Federal agencies, and has enacted a number of statutes aimed at improving the implementation of NEPA, including in the context of infrastructure projects. In particular, Congress enacted legislation to improve coordination among agencies, integrate NEPA with other environmental reviews, and bring more transparency to the NEPA process.

In 2005, Congress enacted 23 U.S.C. 139, ''Efficient environmental reviews for project decisionmaking,'' a streamlined environmental review process for highway, transit, and multimodal transportation projects (the ''section 139 process''), in the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (SAFETEA–LU), Public Law 109–59, section 6002(a), 119 Stat. 1144, 1857. Congress amended section 139 with additional provisions designed to improve the NEPA process in the 2012 Moving Ahead for Progress in the 21st Century Act (MAP–21), Public Law 112–141, sections 1305–1309, 126 Stat. 405, and the 2015 Fixing America's Surface Transportation (FAST) Act, Public Law 114–94, section 1304, 129 Stat. 1312, 1378. Section 139 provides for an environmental review process that is based on the NEPA regulations and codifies many aspects of the regulations, including provisions relating to lead and cooperating agencies, concurrent environmental reviews in a single NEPA document, coordination on the development of the purpose and need statement and reasonable alternatives, and adoption of environmental documents. Further, section 139 provides for referral to CEQ for issue resolution, similar to part 1504 of the NEPA regulations, and allows for the use of errata sheets, consistent with 40 CFR 1503.4(c).[37]

[34] *See* Council on Environmental Quality, Length of Environmental Impact Statements (2013–2017), (July 22, 2019), *https://ceq.doe.gov/nepa-practice/eis-length.html.*

[35] *See, e.g.,* the Clean Air Act, 42 U.S.C. 7401–7671q; Clean Water Act, 33 U.S.C. 1251–1388; Coastal Zone Management Act, 16 U.S.C. 1451–1466; Federal Land Policy and Management Act, 43 U.S.C. 1701–1787; Forest and Rangeland Renewable Resources Planning Act of 1974, 16 U.S.C. 1600–1614; Magnuson-Stevens Fishery Conservation and Management Act, 16 U.S.C. 1801–1884; Endangered Species Act, 16 U.S.C. 1531–1544; Oil Pollution Act of 1990, 33 U.S.C. 2701–2762; Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. 1201, 1202, and 1211; and Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9601–9675.

[36] Similar to NEPA, section 106 (54 U.S.C. 306108) of the National Historic Preservation Act is a procedural statute.

[37] To facilitate the NEPA process for transportation projects subject to section 139, the statute specifically calls for development of a coordination plan, including development of a schedule, and publicly tracking the implementation of that schedule through use of the Permitting Dashboard. In addition, the section 139 process provides for ''participating'' agencies, which are any agencies invited to participate in the environmental review process. Section 139 also requires, to the maximum extent practicable, issuance of a combined final EIS and ROD.

When Congress enacted section 2045 of the Water Resources Development Act of 2007, Public Law 110–114, 121 Stat. 1041, 1103, it created a similar environmental review provision for water resources development projects by the U.S. Army Corps of Engineers. 33 U.S.C. 2348.[38] This project acceleration provision also requires a coordinated environmental review process, provides for dispute resolution, and codifies aspects of the NEPA regulations such as lead and cooperating agencies, concurrent environmental reviews, and the establishment of CEs. Section 2348(o) also directs the Corps to consult with CEQ on the development of guidance for implementing this provision.

Most recently, in 2015 Congress enacted Title 41 of the FAST Act (FAST–41), to provide for a more efficient environmental review and permitting process for ''covered projects.'' *See* Public Law 114–94, § 41001–41014, 129 Stat. 1312, 1741 (42 U.S.C. 4370m—4370m–12). These are projects that require Federal environmental review under NEPA, are expected to exceed $200 million, and involve the construction of infrastructure for certain energy production, electricity transmission, water resource projects, broadband, pipelines, manufacturing, and other sectors. *Id.* FAST–41 codified certain roles and responsibilities required by the NEPA regulations. In particular, FAST–41 imports the concepts of lead and cooperating agencies, and the different levels of NEPA analysis—EISs, EAs, and CEs. Consistent with 40 CFR 1501.5(e) through (f), CEQ is required to resolve any dispute over designation of a facilitating or lead agency for a covered project. 42 U.S.C. 4370m–2(a)(6)(B). Section 4370m–4 codified several requirements from the CEQ regulations, including the requirement for concurrent environmental reviews, which is consistent with 40 CFR 1500.2(c), 1501.7(a)(6) and 1502.25(a), and the tools of adoption, incorporation by reference, supplementation, and use of State documents, consistent with 40 CFR 1506.3, 1502.21, 1502.9(c) and 1506.2.[39] Finally, 42 U.S.C. 4370m–4 addresses interagency coordination on key aspects of the NEPA process including scoping (40 CFR 1501.7), identification of the range of reasonable alternatives for study in an EIS (40 CFR 1502.14), and the public comment process (40 CFR part 1503).

To ensure a timely NEPA process so that important infrastructure projects can move forward, Congress has also established shorter statutes of limitations for challenges to certain types of projects. SAFETEA–LU created a 180-day statute of limitations for highway or public transportation capital projects, which MAP–21 later reduced to 150 days. 23 U.S.C. 139(*l*). The Water Resources Reform and Development Act of 2014 established a three-year statute of limitations for judicial review of any permits, licenses, or other approvals for water resources development project studies. 33 U.S.C. 2348(k). Most recently in FAST–41, Congress established a two-year statute of limitations for covered projects. 42 U.S.C. 4370m–6.

There are a number of additional instances where Congress has enacted legislation to facilitate more timely environmental reviews. For example, similar to the provisions described above, there are other statutes where Congress has called for a coordinated and concurrent environmental review. *See, e.g.,* 33 U.S.C. 408(b) (concurrent review for river and harbor permits); 49 U.S.C. 40128 (coordination on environmental reviews for air tour management plans for national parks); 49 U.S.C. 47171 (expedited and coordinated environmental review process for airport capacity enhancement projects).

Additionally, Congress has established or directed agencies to establish CEs to facilitate NEPA compliance. *See, e.g.,* 16 U.S.C. 6554(d) (applied silvicultural assessment and research treatments); 16 U.S.C. 6591d (hazardous fuels reduction projects to carry out forest restoration treatments); 16 U.S.C. 6591e (vegetation management activity in greater sage-grouse or mule deer habitat); 33 U.S.C. 2349 (actions to repair, reconstruct, or rehabilitate water resources projects in response to emergencies); 42 U.S.C. 15942 (certain activities for the purpose of exploration or development of oil or gas); 43 U.S.C. 1772(c)(5) (development and approval of vegetation management, facility inspection, and operation and maintenance plans); MAP–21, Public Law 112–141, § 1315 (actions to repair or reconstruct roads, highways, or bridges damaged by emergencies), 1316 (projects within the operational right-of-way), and 1317 (projects with limited Federal assistance); FAA Modernization and Reform Act of 2012, Public Law 112–95, 213(c), 126 Stat. 11, 46 (navigation performance and area navigation procedures); and Omnibus Appropriations Act, 2009, Public Law 111–8, 423, 123 Stat. 524, 748 (Lake Tahoe Basin Management Unit hazardous fuel reduction projects).

Further, in the context of emergency response, Congress has directed the use or development of alternative arrangements in accordance with 40 CFR 1506.11 for reconstruction of transportation facilities damaged in an emergency (FAST Act, Pub. L. 114–94, 1432, 129 Stat. 1429) and for projects by the Departments of the Interior and Commerce to address invasive species (Water Infrastructure Improvements for the Nation Act, Pub. L. 114–322, 4010(e)(3), 130 Stat. 1628, 1877). In 2013, Congress also enacted section 429 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (''Stafford Act''), 42 U.S.C. 5189g, which directed the President, in consultation with CEQ and the Advisory Council on Historic Preservation, to ''establish an expedited and unified interagency review process to ensure compliance with environmental and historic requirements under Federal law relating to disaster recovery projects, in order to expedite the recovery process, consistent with applicable law.'' Sandy Recovery Improvement Act of 2013, Public Law 113–2, 1106, 127 Stat. 4, 45. This unified Federal environmental and historic preservation review (UFR) process is a framework for coordinating Federal agency environmental and historic preservation reviews for disaster recovery projects associated with Presidentially declared disasters under the Stafford Act. The goal of the UFR process is to enhance the ability of the Federal environmental review and authorization processes to inform and expedite disaster recovery decisions for grant applicants and other potential beneficiaries of disaster assistance by improving coordination and consistency across Federal agencies, and assisting agencies in better leveraging their resources and tools.[40]

These statutes demonstrate that Congress has recognized that the

[38] Congress significantly revised this provision in the Water Resources Reform and Development Act of 2014, Public Law 113–121, 1005(a)(1), 128 Stat. 1193, 1199.

[39] For covered projects, section 4370m–4 authorizes lead agencies to adopt or incorporate by reference existing environmental analyses and documentation prepared under State laws and procedures if the analyses and documentation meet certain requirements. 42 U.S.C. 4370m–4(b)(1)(A)(i). This provision also requires that the lead agency, in consultation with CEQ, determine that the analyses and documentation were prepared using a process that permitted public participation and consideration of environmental consequences, alternatives, and other required analyses that are substantially equivalent to what a Federal agency would have prepared pursuant to NEPA. *Id.*

[40] *See generally* Memorandum of Understanding Establishing the Unified Federal Environmental and Historic Preservation Review Process for Disaster Recovery Projects (July 29, 2014), *https://www.fema.gov/unified-federal-environmental-and-historic-preservation-review-presidentially-declared-disasters.*

environmental review process can be made more efficient and effective, including for infrastructure projects. Congress also has identified specific process improvements that can accelerate environmental reviews, including improved interagency coordination, concurrent reviews, and increased transparency.

E. Presidential Directives

Over the past two decades and multiple administrations, Presidents also have recognized the need to improve the environmental review process to make it more timely and efficient, and have directed agencies, through Executive Orders and Presidential memoranda, to undertake various initiatives to address these issues. In 2002, President Bush issued E.O. 13274, titled ''Environmental Stewardship and Transportation Infrastructure Project Reviews,'' [41] which stated that the development and implementation of transportation infrastructure projects in an efficient and environmentally sound manner is essential, and directed agencies to conduct environmental reviews for transportation projects in a timely manner.

In 2011, President Obama's memorandum titled ''Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review'' [42] directed certain agencies to identify up to three high-priority infrastructure projects for expedited environmental review and permitting decisions to be tracked publicly on a ''centralized, online tool.'' This requirement led to the creation of what is now the Permitting Dashboard, *www.permits.performance.gov.*

In 2012, E.O. 13604, titled ''Improving Performance of Federal Permitting and Review of Infrastructure Projects,'' [43] established an interagency Steering Committee on Federal Infrastructure Permitting and Review Process Improvement (''Steering Committee'') to facilitate improvements in Federal permitting and review processes for infrastructure projects. The E.O. directed the Steering Committee to develop a plan ''to significantly reduce the aggregate time required to make Federal permitting and review decisions on infrastructure projects while improving outcomes for communities and the environment.'' Similarly, E.O. 13616, titled ''Accelerating Broadband Infrastructure Deployment,'' [44] established an interagency working group to, among other things, avoid duplicative reviews and coordinate review processes to advance broadband deployment.

A 2013 Presidential Memorandum titled ''Modernizing Federal Infrastructure Review and Permitting Regulations, Policies, and Procedures'' [45] directed the Steering Committee established by E.O. 13604 to work with agencies, OMB, and CEQ to ''modernize Federal infrastructure review and permitting regulations, policies, and procedures to significantly reduce the aggregate time required by the Federal Government to make decisions in the review and permitting of infrastructure projects, while improving environmental and community outcomes'' and develop a plan to achieve this goal. Among other things, the memorandum directed that the plan create process efficiencies, including additional use of concurrent and integrated reviews; expand coordination with State, Tribal, and local governments; and expand the use of information technology tools. CEQ and OMB led the effort to develop a comprehensive plan to modernize the environmental review and permitting process while improving environmental and community outcomes, including budget proposals for funding and new authorities. Following the development of the plan, CEQ continued to work with agencies to improve the permitting process, including through expanded collection of timeframe metrics on the Permitting Dashboard. In late 2015, these ongoing efforts were superseded by the enactment of FAST–41, which codified the use of the Permitting Dashboard, established the Federal Permitting Improvement Steering Council (Permitting Council), and established other requirements for managing the environmental review and permitting process for covered infrastructure projects.

On August 15, 2017, President Trump issued E.O. 13807 titled, ''Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure.'' [46] Section 5(e)(i) directed CEQ to develop an initial list of actions to enhance and modernize the Federal environmental review and authorization process, including issuing such regulations as CEQ deems necessary to: (1) Ensure optimal interagency coordination of environmental review and authorization decisions; (2) ensure that multi-agency environmental reviews and authorization decisions are conducted in a manner that is concurrent, synchronized, timely, and efficient; (3) provide for use of prior Federal, State, Tribal, and local environmental studies, analysis, and decisions; and (4) ensure that agencies apply NEPA in a manner that reduces unnecessary burdens and delays, including by using CEQ's authority to interpret NEPA to simplify and accelerate the NEPA review process. In response to E.O. 13807, CEQ published an initial list of actions and stated its intent to review its existing NEPA regulations in order to identify potential revisions to update and clarify these regulations.[47]

F. 2018 Advance Notice of Proposed Rulemaking Requesting Public Comment on CEQ's NEPA Regulations

Consistent with E.O. 13807 and CEQ's initial list of actions, and given the length of time since CEQ issued its regulations, on June 20, 2018, CEQ published an advance notice of proposed rulemaking (ANPRM) titled ''Update to the Regulations for Implementing the Procedural Provisions of the National Environmental Policy Act.'' [48] The ANPRM requested public comments on how CEQ could ensure a more efficient, timely, and effective NEPA process consistent with the Act's national environmental policy and provided for a 30-day comment period. In response to comments, CEQ extended the comment period 31 additional days to August 20, 2018.[49]

The ANPRM requested comment on potential revisions to update and clarify the NEPA regulations, and included a list of questions on specific aspects of the regulations. For example, with respect to the NEPA process, the ANPRM asked whether there are provisions that CEQ could revise to ensure more efficient environmental reviews and authorization decisions, such as facilitating agency use of existing environmental studies, analyses and decisions, as well as improving interagency coordination. The ANPRM also requested comments on the scope of NEPA reviews, including whether CEQ should revise, clarify, or add definitions. The ANPRM also asked whether additional revisions relating to environmental documentation issued pursuant to NEPA, including CEs, EAs, EISs, and other documents, would be appropriate. Finally, the ANPRM requested general comments, including

[41] 67 FR 59449 (Sept. 23, 2002).

[42] *https://www.govinfo.gov/content/pkg/DCPD-201100601/pdf/DCPD-201100601.pdf.*

[43] 77 FR 18887 (Mar. 28, 2012).

[44] 77 FR 36903 (June 20, 2012).

[45] 78 FR 30733 (May 22, 2013).

[46] 82 FR 40463 (Aug. 24, 2017).

[47] 82 FR 43226 (Sept. 14, 2017).

[48] 83 FR 28591 (June 20, 2018).

[49] 83 FR 32071 (July 11, 2018).

whether there were obsolete provisions that CEQ could update to reflect new technologies or make the process more efficient, or that CEQ could revise to reduce unnecessary burdens or delays.

In response to the ANPRM, CEQ received over 12,500 comments, which are available for public review.[50] These included comments from a wide range of stakeholders, including States, Tribes, localities, environmental organizations, trade associations, NEPA practitioners, and interested members of the public. While some commenters opposed any updates to the current regulations, other commenters urged CEQ to consider potential revisions. While the approaches to the update of the NEPA regulations varied, most of the substantive comments supported some degree of updating of the current regulations. Many noted that overly lengthy documents and the time required for the NEPA process remain real and legitimate concerns despite the NEPA regulations' explicit direction with respect to reducing paperwork and delays. In general, numerous commenters requested that CEQ consider revisions to modernize its regulations, reduce unnecessary burdens and costs, and make the NEPA process more efficient, effective, and timely. Discussion of comments is provided in more detail in section II below.

II. Summary of Proposed Rule

In this proposed rule, CEQ would revise and modernize its NEPA regulations to facilitate more efficient, effective, and timely NEPA reviews by Federal agencies. The proposed updates and clarifications to its regulations are based on CEQ's record evaluating the implementation of its NEPA regulations and on comments provided in response to the ANPRM. The proposed updates and clarifications seek to advance the stated objectives of the current regulations, as adopted in 1978, ''[t]o reduce paperwork, to reduce delays, and at the same time to produce better decisions [that] further the national policy to protect and enhance the quality of the human environment.'' [51]

CEQ specifically proposes various revisions to align the regulations with the text of the NEPA statute, including revisions to reflect the procedural nature of section 102(2) of NEPA. CEQ also proposes revisions to ensure that environmental documents prepared pursuant to NEPA are concise and serve their purpose of informing decision makers regarding the significant potential environmental effects of proposed major Federal actions and the public of the environmental issues in the pending decision-making process. CEQ also proposes revisions to ensure that the regulations reflect changes in technology, increase public participation in the process, and facilitate the use of existing studies, analyses and environmental documents prepared by States, Tribes, and local governments.

CEQ also proposes revisions to its regulations consistent with the One Federal Decision policy (''OFD policy'') established by E.O. 13807 for multi-agency review and related permitting and other authorization decisions. The E.O. specifically instructed CEQ to take steps to ensure optimal interagency coordination, including through a concurrent, synchronized, timely, and efficient process for environmental reviews and authorization decisions. In response to the ANPRM, CEQ received many suggestions to codify key aspects of the OFD policy in the NEPA regulations, including by providing greater specificity on the roles and responsibilities of lead and cooperating agencies. Commenters also suggested that the regulations require agencies to establish and adhere to timetables for the completion of reviews, another key element of the OFD policy. In response to these comments and to promote interagency coordination and more timely and efficient reviews, CEQ proposes to codify and make generally applicable a number of key elements from expedited procedures and the OFD policy, including development by the lead agency of a joint schedule, procedures to elevate delays or disputes, preparation of a single EIS and joint ROD to the extent practicable, and a two-year goal for completion of environmental reviews. Consistent with section 104 of NEPA (42 U.S.C. 4334), codification of these policies will not limit or affect the authority or legal responsibilities of agencies under other statutory mandates that may be covered by joint schedules, and CEQ proposes language to that effect in § 1500.6.[52]

CEQ also proposes revisions to clarify the process and documentation required for complying with NEPA by amending part 1501 to add sections on threshold considerations and determining the appropriate level of review; add a section on CEs; and revise sections on EAs, FONSIs, and EISs in part 1502. CEQ further proposes a number of revisions to promote more efficient and timely environmental reviews, including revisions to promote interagency coordination by amending sections of parts 1501, 1506, and 1507 relating to lead, cooperating agencies, timing of agency action, scoping, and agency NEPA procedures. CEQ proposes additional revisions to promote a more efficient and timely NEPA process by amending parts 1501, 1506, and 1507 relating to applying NEPA early in the process, scoping, tiering, adoption, use of current technologies, and avoiding duplication of State, Tribal, and local environmental reviews; revisions to parts 1501 and 1502 to provide for presumptive time and page limits; and revisions to clarify the definitions by amending part 1508.

CEQ also includes provisions to promote informed decision making and to inform the public about the decision-making process. In parts 1500, 1501, 1502, and 1503, CEQ proposes amendments to ensure agencies solicit and consider relevant information early in the development of the draft EIS. In particular, CEQ proposes to direct agencies in the notice of intent (NOI) to request public comment on potential alternatives and impacts, and identification of any relevant information and analyses concerning impacts affecting the quality of the human environment. Additionally, CEQ proposes to direct agencies to include a new section in the draft and final EIS summarizing all alternatives, information, and analyses submitted by the public and to request comment on the completeness of the summary included in the draft EIS.

CEQ further proposes to make revisions to part 1503 to ensure that comments are timely submitted on the draft EIS and on the completeness of the summary of information submitted by the public, and that comments are as specific as possible. Additionally, CEQ proposes a provision in § 1502.18 to require that, based on the summary of the alternatives, information, and analyses section, the decision maker for the lead agency certify that the agency has considered such information. This will advance the purposes of the directive in E.O. 11991 to ensure that EISs are supported by evidence that agencies have made the necessary environmental analyses. *See* E.O. 11991, § 1 amending E.O. 11514, § 3(h). Upon certification, the proposed provisions in §§ 1500.3 and 1502.18 would establish a conclusive presumption that the agency has considered such information. In conjunction with the certification requirement, this presumption is

[50] *See https://www.regulations.gov,* docket no. CEQ–2018–0001.

[51] 43 FR 55978 (Nov. 29, 1978).

[52] In the preamble, CEQ uses the section symbol (§) to refer to the proposed regulations as set forth in this NPRM and 40 CFR to refer to the current CEQ regulations as set forth in 40 CFR parts 1500–1508.

consistent with the longstanding presumption of regularity that government officials have properly discharged their official duties. *See U.S. Postal Serv.* v. *Gregory,* 534 U.S. 1, 10 (2001) (''[W]e note that a presumption of regularity attaches to the actions of government agencies.'' (citing *United States* v. *Chem. Found., Inc.,* 272 U.S. 1, 14–15 (1926)). This is also consistent with case law upholding regulatory presumptions. *See, e.g., Allentown Mack Sales & Serv.* v. *Nat'l Labor Relations Bd.,* 522 U.S. 359 (1998); *Fed. Commc'ns Comm'n* v. *Schreiber,* 381 U.S. 279 (1965).

Finally, CEQ proposes changes to make the regulations easier to understand and apply. This includes proposed revisions to simplify and clarify key definitions in § 1508.1. CEQ also proposes certain changes to move and consolidate operative language from the definitions to the relevant regulatory provisions, while leaving the definitional language in the definitions section. In the existing regulations, provisions on certain topics are scattered throughout, making it unnecessarily difficult to navigate the requirements. In some cases, the NEPA regulations address topics in multiple sections and sometimes multiple parts. CEQ proposes to revise the regulations to consolidate provisions and reduce duplication. Such consolidation, reordering, or reorganizing also would promote greater clarity and ease of use.

A. Proposed Changes Throughout Parts 1500–1508

CEQ proposes several revisions throughout parts 1500–1508 to provide consistency, improve clarity, and correct grammatical errors. CEQ proposes to make certain grammatical corrections in the regulations where it proposes other changes to the regulations to achieve the goals of this rulemaking, or where CEQ determined the changes are necessary for the reader to understand fully the meaning of the sentence. CEQ proposes to revise sentences from passive voice to active voice where it is helpful to identify the responsible parties. CEQ also proposes to replace the word ''insure'' with ''ensure,'' consistent with modern usage. Finally, CEQ proposes to add paragraph letters or numbers to certain introductory paragraphs where it would improve clarity. CEQ invites comment on whether it should make these types of changes throughout the rule or if there are additional specific instances where CEQ should make these types of changes.

CEQ proposes to add ''Tribal'' to the phrase ''State and local'' throughout the rule to ensure consultation with Tribal entities and to reflect existing NEPA practice to coordinate or consult with affected Tribal governments and agencies, as necessary and appropriate for a proposed action. This proposed change is also in response to comments on the ANPRM supporting expansion of the recognition of the sovereign rights, interests, and expertise of Tribes. CEQ proposes to eliminate the provisions in the current regulations that limit Tribal interest to reservations. *See* proposed §§ 1501.8(a), 1502.16(a)(5), 1503.1(a)(2)(ii), and 1506.6(b)(3)(ii). The proposed changes are consistent with and in support of government-to-government consultation pursuant to E.O. 13175, titled ''Consultation and Coordination With Indian Tribal Governments.'' [53]

CEQ proposes several changes for consistent use of certain terms. In particular, CEQ proposes to change ''entitlements'' to the defined term ''authorizations'' throughout the proposed regulation and added ''authorizations'' where appropriate to reflect the mandate in E.O. 13807 for better integration and coordination of authorization decisions and related environmental reviews. CEQ proposes conforming edits to add or change ''entitlements'' to ''authorizations'' in proposed §§ 1501.2(a), 1501.7(i), 1501.9(d)(4) and (f)(4), 1502.13, 1502.25(b), 1503.3(d), 1506.2, and the definitions of authorization and participating agency in § 1508.1(c) and (w).

CEQ proposes to use the term ''decision maker'' to refer to an individual responsible for making decisions on agency actions and to define the term ''senior agency official'' to refer to an individual with responsibilities for NEPA compliance. Under the proposed rule, the senior agency official would be an official of assistant secretary rank or higher who is responsible for agency compliance. The responsibilities of this position in the proposed regulations would be consistent with the responsibilities of senior agency officials in E.O. 13807 to whom anticipated missed or extended permitting timetable milestones are elevated. The proposed regulations would set forth a variety of responsibilities for senior agency officials, such as approval to exceed page or time limits. *See* proposed §§ 1501.5(e), 1501.7(d), 1501.8(b)(6) and (c), 1501.10, 1502.7, and 1507.2.

CEQ proposes to replace ''circulate'' or ''circulation'' with ''publish'' or ''publication'' throughout the rule and make ''publish'' a defined term that provides agencies with the flexibility to make environmental review and information available to the public by electronic means not available at the time of promulgation of the CEQ regulations in 1978. Historically, the practice of circulation included mailing of hard copies or providing electronic copies on disks or CDs. While it may be necessary to provide a hard copy or copy on physical media in limited circumstances, agencies now provide most documents in an electronic format by posting them online and using email or other electronic forms of communication to notify interested or affected parties. This change would help reduce paperwork and delays, and modernize the NEPA process to be more accessible to the public. CEQ proposes these changes in proposed §§ 1500.4(o), 1501.2(b)(2), 1502.9, 1502.20, 1502.21, 1503.4(c), 1506.3, and 1506.8(c)(2).

CEQ proposes to change the term ''possible'' to ''practicable'' in proposed §§ 1501.7(h)(1) and (2), 1501.9(b)(1), 1502.5, 1502.9(b), 1504.2, and 1506.2(b) and (c). ''Practicable'' is the more commonly used term in regulations to convey the ability for something to be done, considering the cost, including time required, technical and economic feasibility, and the purpose and need for agency action. Similarly, CEQ proposes to change ''no later than immediately'' to ''as soon as practicable'' in § 1502.5(b). Finally, CEQ proposes to refer to the procedures required in § 1507.3 using the term ''agency NEPA procedures'' throughout.

CEQ proposes to eliminate obsolete references and provisions in several sections of the CEQ regulations. In particular, CEQ proposes to remove references to the 102 Monitor in 40 CFR 1506.6(b)(2) and 1506.7(c) because the publication no longer exists, and OMB Circular A–95, which was revoked pursuant to section 7 of E.O. 12372 (47 FR 30959, July 16, 1982), including the requirement to use State and area-wide clearinghouses in 40 CFR 1501.4(e)(2), 1503.1(a)(2)(iii), 1505.2, and 1506.6(b)(3)(i).

Finally, CEQ proposes changes to citations and authorities. CEQ would update the authorities sections for each part to correct the format. CEQ also proposes to remove cross-references to the sections of part 1508, ''Definitions,'' and to update or insert new cross-references throughout the rule to reflect revised or new sections.

[53] 65 FR 67249 (Nov. 9, 2000).

B. Proposed Revisions To Update the Purpose, Policy, and Mandate (Part 1500)

In part 1500, CEQ proposes several revisions to update the policy and mandate sections of the regulations to reflect statutory, judicial, policy, and other developments since the CEQ regulations were issued in 1978.

CEQ specifically proposes to retitle and revise § 1500.1, ''Purpose and Policy'' to align this section with the statutory text of NEPA and certain case law and reflect the procedural requirements of section 102(2) (42 U.S.C. 4332(2)). In particular, the proposed revisions would provide that NEPA is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. The Supreme Court has made clear that NEPA is a procedural statute that does not mandate particular results; ''[r]ather, NEPA imposes only procedural requirements on [F]ederal agencies with a particular focus on requiring agencies to undertake analyses of the environmental impact of their proposals and actions.'' *Pub. Citizen,* 541 U.S. at 756–57 (citing *Methow Valley,* 490 U.S. at 349–50); *see also Vt. Yankee,* 435 U.S. at 558 (''NEPA does set forth significant substantive goals for the Nation, but its mandate to the agencies is essentially procedural.'').

CEQ proposes to revise § 1500.1(a) to summarize section 101 of the Act (42 U.S.C. 4331). CEQ further proposes to revise § 1500.1(a) to reflect that section 102(2) establishes the procedural requirements to carry out the policy stated in section 101. Additionally, CEQ proposes to revise § 1500.1(a) to reflect, consistent with the case law, that the purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information, that the public has been informed regarding the decision-making process, and that NEPA does not mandate particular results or substantive outcomes. These proposed revisions would revise paragraph (a) in § 1500.1 to replace the vague reference to ''action-forcing'' provisions ensuring that Federal agencies act ''according to the letter and spirit of the Act'' with a more specific reference to the consideration of environmental impacts of their actions in agency decisions. These changes would codify the Supreme Court's interpretation of section 102 as serving NEPA's ''action-forcing'' purpose in two important respects: Section 102 ''ensures that the agency, in reaching its decision, will have available, and will carefully consider, detailed information concerning significant environmental impacts; it also guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decision[-]making process and the implementation of that decision.'' *Methow Valley,* 490 U.S. at 349 (citing *Balt. Gas & Elec. Co.,* 462 U.S. at 97; *Weinberger,* 454 U.S. at 143); *see also Winter* v. *Nat. Res. Def. Council, Inc.,* 555 U.S. 7, 23 (2008); *Pub. Citizen,* 541 U.S. at 756–58.

CEQ proposes to revise § 1500.1(b) to describe the regulations that follow consistent with the proposed revisions. In particular, CEQ proposes to revise this paragraph to reflect that the regulations include direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements and the level of NEPA review, where applicable. The proposed revisions also reflect that the regulations are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies. The proposed revisions reflect that, consistent with E.O. 13807 and the purposes of the regulations as originally promulgated in 1978, the regulations are intended to reduce unnecessary burdens and delays. These proposed revisions are supported by many comments submitted in response to the ANPRM requesting revisions to promote more efficient and timely reviews under NEPA. These proposed amendments emphasize that the policy of integrating NEPA with other environmental reviews is to promote concurrent and timely reviews and decision making consistent with statutes, Executive Orders, and CEQ guidance. *See, e.g.,* 42 U.S.C. 5189g; 23 U.S.C. 139; 42 U.S.C. 4370m *et seq.;* E.O. 13604; E.O. 13807; Mitigation Guidance, *supra* note 18, and Timely Environmental Reviews Guidance, *supra* note 21. Finally, CEQ proposes to strike § 1500.2, ''Policy,'' which is duplicative of subsequent sections of the regulations, in order to simplify the regulations and eliminate redundancy and repetition.

CEQ proposes to make a number of revisions and additions, to § 1500.3, ''NEPA compliance,'' and to provide paragraph headings to improve readability. CEQ proposes to amend the discussion of paragraph (a), ''Mandate,'' to clarify that agency NEPA procedures to implement the CEQ regulations, as provided for in § 1507.3, shall not impose additional procedures or requirements beyond those set forth in the CEQ regulations except as otherwise provided by law or for agency efficiency. CEQ intends that this provision will prevent agencies from designing additional procedures that will result in increased costs or delays.

CEQ proposes to add a new § 1500.3(b), ''Exhaustion,'' which would provide that agencies must request comments on potential alternatives and impacts and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an EIS. It would provide that comments on draft EISs and any information on environmental impacts or alternatives to a proposed action must be timely submitted to ensure informed decision making by Federal agencies. CEQ further proposes to provide that comments not timely raised and information not provided shall be deemed unexhausted and forfeited. This reinforces that parties may not raise claims based on issues they did not raise during the public comment period.

It also would provide that agencies must include in the EIS a summary of comments received, and any objections to that summary must be submitted within 30 days of the publication of the notice of availability of the final EIS. Based on the summary, the decision maker must certify in the record of decision that the agency has considered all of the alternatives, information, and analyses submitted by public commenters.

In addition, CEQ proposes to add a new § 1500.3(c), ''Actions regarding NEPA compliance,'' to reflect the development of case law since the promulgation of the CEQ regulations. Specifically, CEQ proposes to revise the sentence regarding timing of judicial review to strike references to the filing of an EIS or FONSI and replace it with the issuance of a signed ROD or the taking of another final agency action. Under the APA, judicial review does not occur until an agency has taken final agency action. *Bennett* v. *Spear,* 520 U.S. 154, 177–78 (1997) (the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature—and the action must be one by which rights or obligations have been determined or from which legal consequences will flow (citations omitted)). Because NEPA's procedural requirements apply to proposals for agency action, judicial review should not occur until the agency has completed its decision-making process. Final agency action for judicial review purposes is not necessarily when the agency publishes the final EIS, issues a

FONSI, or makes the determination to categorically exclude an action; however, an agency may designate any of these as its final agency action. CEQ also proposes to strike vague language and to clarify that an agency can remedy harm from the failure to comply with NEPA by complying with the Act as interpreted in these regulations.

The CEQ regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. As the Supreme Court has held, the irreparable harm requirement, as a prerequisite to the issuance of preliminary or permanent injunctive relief, is neither eliminated nor diminished in NEPA cases. A showing of a NEPA violation alone does not warrant injunctive relief and does not satisfy the irreparable harm requirement. *See Monsanto Co.* v. *Geertson Seed Farms,* 561 U.S. 139, 157 (2010) (''[T]he statements quoted above [from prior Ninth Circuit cases] appear to presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances. No such thumb on the scales is warranted.''); *Winter,* 555 U.S. at 21–22, 31–33; *see also Amoco Prod. Co.* v. *Vill. of Gambell,* 480 U.S. 531, 544–545 (1987) (rejecting proposition that irreparable damage is presumed when an agency fails to evaluate thoroughly the environmental impact of a proposed action). Moreover, a showing of irreparable harm in a NEPA case does not entitle a litigant to an injunction or a stay. *See Winter,* 555 U.S. at 20 (''A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, *and* that an injunction is in the public interest.'') (emphasis added); *Geertson Seed Farms,* 561 U.S. at 157 (''The traditional four-factor test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation. . . . An injunction should issue only if the traditional four-factor test is satisfied.'').

CEQ proposes to clarify that NEPA and the APA allow agencies the flexibility to structure their decision-making processes to allow opportunities for affected parties to seek a stay of an agency's final decision from the agency pending judicial review of the decision. Such stays are authorized by the APA, are expressly contemplated by Fed. R. App. P. 18, and are analogous in key respects to stays of district court judgments available under Fed. R. Civ. P. 62(b) and (d). *See* 5 U.S.C. 705; *see also* Fed. R. App. P. 18(a)(1) and 18(a)(2)(A). In appropriate circumstances, agencies may impose bond and security requirements or other conditions. *See, e.g.,* 5 U.S.C. 301,[54] as a prerequisite to staying their decisions, as courts do under Fed. R. App. P. 18 and other rules.[55] *See* Fed. R. App. P. 18(b); Fed. R. App. P. 8(a)(2)(E); Fed. R. Civ. P. 65(c); Fed. R. Civ. P. 62(b); Fed. R. Civ. P. 62(d). CEQ invites comment on whether there are disclosure or other transparency requirements that should be required when agencies establish bond or security requirements or other conditions.

In addition to the authority provided by 5 U.S.C. 705 and by agencies' various organic statutes, agency stays of their decisions and appropriate conditions on such stays may further the purposes of NEPA, which provides that all Federal agencies shall identify and develop methods and procedures, in consultation with CEQ, to ensure that environmental amenities and values are given appropriate consideration in decision making along with economic and technical considerations. 42 U.S.C. 4332(B). Agency procedures that allow for agencies to stay their decisions, including appropriate conditions on stays, can contribute to an orderly process whereby judicial review of agency decisions may occur, furthering NEPA's mandate to agencies to develop methods and procedures to ensure the appropriate consideration of environmental, economic, and technical factors in agency decision making. CEQ invites comment on how agencies can structure their processes to ensure appropriate consideration of these factors.

CEQ proposes to add a new § 1500.3(d), ''Remedies.'' CEQ proposes to state explicitly that harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements, and that CEQ's regulations do not create a cause of action for violation of NEPA. The statute does not create any such cause of action, and agencies may not create private rights of action by regulation; ''[l]ike substantive [F]ederal law itself, private rights of action to enforce [F]ederal law must be created by Congress.'' *Alexander* v. *Sandoval,* 532 U.S. 275, 286 (2001). CEQ also proposes to state that any actions to review, enjoin, stay, or alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable to avoid or minimize any costs to agencies, applicants, or any affected third parties. As reflected in comments received in response to the ANPRM, delays have the potential to result in substantial costs.

CEQ also proposes to state that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action. This would replace and update 40 CFR 1500.3, which provides that trivial violations should not give rise to an independent cause of action. Invalidating actions due to minor errors does not advance the goals of the statute and adds delays and costs.

Finally, CEQ proposes to add a new § 1500.3(e), ''Severability,'' to address the possibility that this rule, or portions of this rule, may be challenged in litigation. It is CEQ's intent that the individual sections of this rule be severable from each other, and that if any sections or portions of the regulations are stayed or invalidated, the validity of the remainder of the sections shall not be affected and shall continue to be operative.

CEQ proposes to reorder the paragraphs in § 1500.4, ''Reducing paperwork,'' and § 1500.5, ''Reducing delay,'' for a more logical ordering, consistent with the three levels of NEPA review. Finally, CEQ proposes edits to § 1500.4 and § 1500.5 for consistency with proposed edits to the cross-referenced sections.

Finally, as noted above, CEQ proposes to add a savings clause to § 1500.6, ''Agency authority,'' to clarify that the CEQ regulations do not limit an agency's other authorities or legal responsibilities. This clarification is consistent with section 104 of NEPA (42 U.S.C. 4334) and the current regulations, but acknowledges the possibility of different statutory authorities that may set forth different requirements, such as timeframes.

CEQ invites comment on the proposed changes to part 1500, particularly proposed § 1500.3 and whether CEQ should include any additional changes or provisions to advance timely resolution of disputes related to NEPA compliance to ensure a

[54] 5 U.S.C. 301, titled ''Department regulations,'' is known as the housekeeping statute and permits the head of a Department to promulgate regulations ''for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.'' The purpose of this statute is ''simply a grant of authority to [an] agency to regulate its own affairs'' through ''what the APA terms 'rules of agency organization, procedure or practice' as opposed to 'substantive rules.' '' *Chrysler Corp.* v. *Brown,* 441 U.S. 281, 309–10 (1979).

[55] CEQ notes that there is no ''NEPA exception'' that exempts litigants bringing NEPA claims from otherwise applicable bond or security requirements or other appropriate conditions, and that some courts have imposed substantial bond requirements in NEPA cases.

timely and predictable process, and avoidance of litigation.

C. Proposed Revisions to NEPA and Agency Planning (Part 1501)

CEQ proposes significant changes to part 1501. CEQ proposes to replace the current 40 CFR 1501.1, ''Purpose,'' because it is unnecessary and duplicative, with a new section to address threshold considerations. CEQ proposes to add additional sections to address the level of NEPA review and CEs. CEQ further proposes to consolidate and clarify provisions on EAs and FONSIs, and relocate from part 1502 the provisions on tiering and incorporation by reference. CEQ also proposes to set presumptive time limits for the completion of NEPA reviews, and clarify the roles of lead and cooperating agencies to further the OFD policy and encourage more efficient and timely NEPA reviews.

1. NEPA Threshold Applicability Analysis (§ 1501.1)

Since the enactment of NEPA, courts have examined the applicability of NEPA based on a variety of considerations. For example, courts have found that NEPA is inapplicable where an agency is carrying out a non-discretionary duty or obligation, where an agency's statutory obligations clearly or fundamentally conflict with NEPA compliance, where Congress has established requirements under another statute that displaces NEPA compliance, and where environmental review and public participation procedures under another statute are functionally equivalent to those required by NEPA.

CEQ proposes a new § 1501.1, ''NEPA threshold applicability analysis,'' to provide a series of considerations to assist agencies in a threshold analysis for determining whether NEPA applies. CEQ also proposes related changes in § 1507.3(c) to provide that agencies may identify actions that are not subject to NEPA in their agency NEPA procedures. Paragraph (b) of § 1501.1 would clarify that agencies can also make this determination on a case-by-case basis.

2. Apply NEPA Early in the Process (§ 1501.2)

CEQ proposes to amend the introductory paragraph of § 1501.2, ''Apply NEPA early in the process,'' to change ''shall'' to ''should'' and ''possible'' to ''reasonable.'' Agencies need the discretion to structure the timing of their NEPA processes to align with their decision-making processes, consistent with their statutory authorities. Agencies need flexibility to determine the appropriate time to start the NEPA process, based on the context of the particular proposed action and governed by the rule of reason, so that the NEPA analysis meaningfully informs the agency's decision. The appropriate time to begin the NEPA process is dependent on when the agency has sufficient information and how it can most effectively integrate the NEPA review into the agency's decision-making process. Further, some have viewed this provision as a legally enforceable standard, rather than an opportunity for agencies to integrate NEPA into their decision-making programs and processes. CEQ's view is that agencies should have discretion with respect to timing, consistent with its regulatory provisions for deferring NEPA analysis to appropriate points in the decision-making process. *See* 40 CFR 1508.28. This proposed amendment is consistent with CEQ guidance that agencies should ''concentrate on relevant environmental analysis'' in their EISs rather than ''produc[ing] an encyclopedia of all applicable information.'' Timely Environmental Reviews Guidance, *supra* note 21; *see also* 40 CFR 1500.4(b) and 1502.2(a). Therefore, CEQ proposes these changes to clarify that agencies have discretion to structure their NEPA processes in accordance with the rule of reason. CEQ also proposes to change ''possible'' to ''reasonable'' in paragraph (b)(4)(iii) and ''shall'' to ''should'' in the introductory paragraph of § 1502.5 for consistency.

CEQ also proposes to amend § 1501.2(b)(2) to clarify that agencies should consider economic and technical analyses along with environmental effects. Finally, CEQ proposes to amend paragraph (b)(4)(ii) to change ''agencies'' to ''governments'' consistent with and in support of government-to-government consultation pursuant to E.O. 13175 [56] and E.O. 13132, ''Federalism.'' [57] For consistency, CEQ also proposes revisions to §§ 1501.9(b) and 1503.1(a)(2)(ii).

3. Determine the Appropriate Level of NEPA Review (§ 1501.3)

NEPA requires a ''detailed statement'' for ''major Federal actions significantly affecting the quality of the human environment.'' 42 U.S.C. 4332(2)(C). To determine whether an action requires such a detailed statement, the CEQ regulations provide three levels of review for Federal agencies to assess proposals for agency action. Specifically, the CEQ regulations allow agencies to review expeditiously those actions that normally do not have significant effects by using CEs or, for actions that are not likely to have significant effects, by preparing an EA. Through the use of CEs and EAs, agencies then can focus their limited resources on those actions that are likely to have significant effects and require the ''detailed statement,'' or EIS, required by NEPA.

While the existing CEQ regulations provide for these three levels of NEPA review, they do not clearly set out the decisional framework by which agencies should assess their proposed actions and select the appropriate level of review. To provide this direction and clarity, the proposed rule would add two additional sections to part 1501, renumber the remaining sections, and retitle two sections. The proposed § 1501.3, ''Determine the appropriate level of NEPA review,'' would describe the three levels of NEPA review and the basis upon which an agency makes a determination regarding the appropriate level of review for a proposed action. While this section would supplement the existing regulations, these concepts exist in the current 40 CFR 1501.4 (whether to prepare an EIS), 1508.4 (CEs), and 1508.9 (EAs).

Additionally, paragraph (b) would address the consideration of significance, which is central to determining the appropriate level of review. CEQ proposes to move and simplify the operative language from 40 CFR 1508.27, ''Significantly.'' CEQ proposes to change ''context'' to ''potentially affected environment'' and ''intensity'' to ''degree'' to provide greater clarity as to what agencies should consider in assessing potential significant effects. CEQ did not include a consideration regarding controversy (40 CFR 1508.27(b)(4)) because this has been interpreted to mean scientific controversy. Additionally, CEQ did not include a consideration regarding the reference in 40 CFR 1508.27(b)(7) to ''[s]ignificance cannot be avoided by terming an action temporary or by breaking it down into small component parts'' because this is addressed in the criteria for scope in § 1501.9(e) and § 1502.4(a), which would provide that agencies evaluate in a single EIS proposals or parts of proposals that are related closely enough to be, in effect, a single course of action.

4. Categorical Exclusions (CEs) (§ 1501.4)

Under the CEQ regulations, agencies can categorically exclude actions from detailed review where the agency has found in its agency NEPA procedures that the action normally would not have

[56] *Supra* note 53.

[57] 64 FR 43255 (Aug. 10, 1999).

significant effects. Over the past 4 decades, Federal agencies have developed and documented more than 2,000 CEs.[58] CEQ estimates that each year, Federal agencies apply CEs to approximately 100,000 Federal agency actions that typically require little or no documentation.[59] While CEs are the most common level of NEPA review, CEQ has only addressed CE development and implementation in one comprehensive guidance document, *see* CE Guidance, *supra* note 17, and does not address CEs in detail in its current regulations.

In response to the ANPRM, many commenters requested that CEQ update the NEPA regulations to provide more detailed direction on the application of CEs. To provide greater clarity, CEQ proposes to add a new section on CEs. The proposed § 1501.4, ''Categorical exclusions,'' would address in more detail the process by which an agency considers whether a proposed action is categorically excluded under NEPA. This proposed provision is consistent with the definition of categorical exclusion in 40 CFR 1508.4, which is a category of actions that the agency has found normally do not have a significant effect and listed in its agency NEPA procedures.

The proposed CE section would provide additional clarity on the process that agencies follow in applying a CE. In particular, paragraph (a) would provide that agencies identify CEs in their NEPA procedures, consistent with the requirement to establish CEs in agency NEPA procedures currently set forth in 40 CFR 1507.3(b)(2)(ii). The proposed regulations would move the requirement that agency NEPA procedures provide for extraordinary circumstances from the current 40 CFR 1508.4 to the proposed § 1507.3(d)(2)(ii) to consolidate all the requirements for establishing CEs in that regulation, while providing in the proposed § 1501.4 the procedure for evaluation of a proposed action for extraordinary circumstances. The definition of categorical exclusion only applies to those CEs created by an administrative determination in its agency NEPA procedures and does not apply to ''legislative categorical exclusions'' created by Congress, which are governed by the terms of the specific statute and statutory interpretation of the agency charged with the implementation of the statute.

Paragraph (b) of proposed § 1501.4 would set forth the requirement for consideration of extraordinary circumstances once an agency determines that a CE covers a proposed action, consistent with the current requirement in 40 CFR 1508.4. Finally, paragraph (b)(1) would provide that, when extraordinary circumstances are present, agencies may consider whether mitigating circumstances, such as the design of the proposed action to avoid effects that create extraordinary circumstances, are sufficient to allow the proposed action to be categorically excluded. The change would clarify that the mere presence of extraordinary circumstances does not preclude the application of a CE. Rather, the agency may consider whether there is a close causal relationship between a proposed action and the potential effect on the conditions identified as extraordinary circumstances, and if such a relationship exists, the potential effect of a proposed action on these conditions. Accordingly, the agency could modify the proposed action to avoid the extraordinary circumstances so that the action fits in the categorical exclusion. While this reflects current practice for some agencies,[60] this revision would assist agencies as they consider whether to categorically exclude an action that would otherwise be considered in an EA and FONSI.

CEQ invites comment on these proposed revisions and on whether there are any other aspects of CEs that CEQ should address in its regulations. Specifically, CEQ invites comment on whether it should establish government-wide CEs in its regulations to address routine administrative activities, for example, internal orders or directives regarding agency operations, procurement of office supplies and travel, and rulemakings to establish administrative processes such as those established under the Freedom of Information Act or Privacy Act. Alternatively, CEQ invites comment on whether and how CEQ should revise the definition of major Federal action to exclude these categories from the definition, and if so, suggestions on how it should be addressed.

5. Environmental Assessments (EAs) (§ 1501.5)

Under the current CEQ regulations, when an agency has not categorically excluded a proposed action, the agency can prepare an EA to document its effects analysis. If the analysis in the EA demonstrates that the action's effects would not be significant, the agency documents its reasoning in a FONSI, which completes the NEPA process; otherwise, the agency uses the EA to help prepare an EIS. *See* 40 CFR 1508.9 and 1508.13. CEQ estimates that Federal agencies prepare approximately 10,000 EAs each year.[61]

The current CEQ regulations address the requirements for EAs in a few provisions, and, in response to the ANPRM, some commenters requested that the regulations provide more detailed direction related to EAs. Currently, 40 CFR 1508.9 defines an EA as a ''concise public document'' that agencies may use to comply with NEPA and determine whether to prepare an EIS or a FONSI. This section also sets forth the basic requirements for an EA's contents. Current 40 CFR 1501.4(b) provides the public involvement requirements for EAs. These essential requirements of an EA would remain under the proposed regulations, but CEQ proposes to consolidate them into a single section to improve readability.

Under the current regulations, the format for an EA is flexible and responsive to agency decision-making needs and the circumstances of the particular proposal for agency action. The proposed CEQ regulations would continue to provide that an EA may be prepared by and with other agencies, applicants, and the public. Modern information technology can help facilitate this collaborative EA preparation, allowing the agency to make a coordinated but independent evaluation of the environmental issues and assume responsibility for the scope and content of the EA.

CEQ proposes to revise paragraph (a) of proposed § 1501.5 (current 40 CFR 1501.3) to clarify that an agency must prepare an EA when necessary to determine whether a proposed action would have a significant effect or the significance of the effects is unknown, unless a CE applies to the proposed action or the agency decides to prepare an EIS. CEQ proposes to move the operative language relating to an EA

[58] *See* Council on Environmental Quality, List of Federal Agency Categorical Exclusions (Dec. 14, 2018), *https://ceq.doe.gov/nepa-practice/categorical-exclusions.html.*

[59] *See, e.g.,* Council on Environmental Quality, The Eleventh and Final Report on the National Environmental Policy Act Status and Progress for American Recovery and Reinvestment Act of 2009 Activities and Projects (Nov. 2, 2011), *https://ceq.doe.gov/docs/ceq-reports/nov2011/CEQ_ARRA_NEPA_Report_Nov_2011.pdf.*

[60] *See, e.g.,* Forest Service categorical exclusions, 36 CFR 220.6(b)(2) and surface transportation categorical exclusions, 23 CFR 771.116–771.118.

[61] *See, e.g.,* Council on Environmental Quality, Fourth Report on Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act, Attachment A (Oct. 4, 2016), *https://ceq.doe.gov/docs/ceq-reports/Attachment-A-Fourth-Cooperating-Agency-Report_Oct2016.pdf.*

from the definition of EAs currently in 40 CFR 1508.9 to a new paragraph (c).

Under the proposed CEQ regulations, requirements for documenting the proposed action and alternatives in an EA would continue to be more limited than EIS requirements. Under the existing and proposed regulations, an agency must briefly describe the need for the proposed action. Agencies can do this by briefly describing the existing conditions, projected future conditions, and statutory obligations and authorities that may relate to the proposed agency action with cross-references to supporting documents. The proposed CEQ regulations would continue to require agencies to describe briefly the proposed action and any alternatives it is considering that would meet the need of the proposed agency action. For actions to protect or restore the environment, without unresolved conflicts concerning alternative uses of available resources, CEQ expects agencies to examine a narrower range of alternatives to the proposed action. When the project may have significant impacts, the agency should consider reasonable alternatives that would avoid those impacts or otherwise mitigate those impacts to less than significant levels.

An agency does not need to include a detailed discussion of each alternative in an EA, nor does it need to include any detailed discussion of alternatives that it eliminated from study. While agencies have discretion to include more information in their EAs than is required to determine whether to prepare an EIS or a FONSI, they should carefully consider their reasons and have a clear rationale for doing so. Agencies should focus on analyzing material effects and alternatives, rather than marginal details that may unnecessarily delay the environmental review process.

Under both the current and proposed regulations, an agency must describe the environmental impacts of its proposed action and alternatives, providing enough information to support a determination to prepare either a FONSI or an EIS. The EA should focus on whether the proposed action (including mitigation) would ''significantly'' affect the quality of the human environment and tailor the length of the discussion to the relevant effects. The agency may contrast the impacts of the proposed action and alternatives with the current and expected future conditions of the affected environment in the absence of the action, which constitutes consideration of a no-action alternative.

Under both the current and proposed regulations, an agency should list the ''agencies, applicants, and the public'' involved in preparing the EA to document agency compliance with the requirement to ''involve environmental agencies, applicants, and the public, to the extent practicable, in preparing assessments.'' 40 CFR 1501.4(b); *see also* 1508.9(b). This may include incorporation by reference to the records related to compliance with other environmental laws such as the National Historic Preservation Act, Clean Water Act, Endangered Species Act, or Clean Air Act.

CEQ proposes to move the public involvement requirements for EAs from the current 40 CFR 1501.4(b) to proposed § 1501.5(d) and change ''environmental'' to ''relevant'' agencies to include all agencies that may contribute information that is relevant to the development of an EA. Consistent with the current CEQ regulations, the proposed rule would not specifically require publication of a draft EA for public review and comment. The proposed CEQ regulations would continue to require that agencies reasonably involve relevant agencies, the applicant, and the public prior to completion of the EA, so that they may provide meaningful input on those subject areas that the agency must consider in preparing the EA. *See also* 40 CFR 1506.6(b) and 1508.9(a). Depending on the circumstances, the agency could provide adequate information through public meetings or by a detailed scoping notice, for example. There is no single correct approach for public involvement. Rather, agencies should consider the circumstances and have discretion to conduct public involvement tailored to the interested public, to available means of communications to reach the interested and affected parties, and to the particular circumstances of each proposed action.

Paragraph (e) would establish a presumptive 75-page limit for EAs, but allow a senior agency official to approve a longer length and establish a new page limit in writing. While CEQ has stated in Question 36a of the Forty Questions, *supra* note 10, that EAs should be approximately 10 to 15 pages, in practice, such assessments are often longer to address compliance with other applicable laws, and to document the effects of mitigation to support a FONSI. To achieve the presumptive 75-page limit, agencies should write all NEPA environmental documents in plain language, follow a clear format, and emphasize important impact analyses and relevant information necessary for those analyses, rather than providing extensive background material. An EA should have clear and concise conclusions and may incorporate by reference data, survey results, inventories, and other information that support these conclusions, so long as this information is reasonably available to the public.

The proposed presumptive page limit for EAs will promote more readable documents, but also provide agencies flexibility to prepare longer documents, where necessary, to support the agency's analysis. The proposed presumptive page limit is consistent with CEQ's guidance on EAs, which advises agencies to avoid preparing lengthy EAs except in unusual cases where a proposal is so complex that a concise document cannot meet the goals of an EA and where it is extremely difficult to determine whether the proposal could cause significant effects. Question 36a and 36b, Forty Questions, *supra* note 10.

CEQ believes that page limits will encourage agencies to identify the relevant issues, focus on significant environmental impacts, and prepare concise readable documents that will inform decision makers as well as the public. Voluminous, unfocused environmental documents do not advance the goals of informed decision making or protection of the environment.

CEQ proposes conforming edits to § 1500.4(c) to broaden the paragraph to include EAs by changing ''environmental impact statements'' to ''environmental documents'' and changing ''setting'' to ''meeting'' since page limits would be required for both EAs and EISs. CEQ invites comment on the appropriate presumptive page limit for EAs, the means of managing their level of detail, and their role in agency decision making.

CEQ proposes a new paragraph (f) to clarify that agencies may also apply certain provisions in part 1502 regarding incomplete or unavailable information, methodology and scientific accuracy, and coordination of environmental review and consultation requirements to EAs. CEQ also proposes to add EAs to § 1501.11, ''Tiering,'' to codify current agency practice of using EAs where the effects of a proposed agency action are not likely to be significant. These include program decisions that may facilitate later site-specific EISs as well as the typical use of EAs as a second-tier document tiered from an EIS.

In addition to the new § 1501.5, CEQ proposes to add EAs to other sections of the regulations to codify existing agency practice where it would make the NEPA process more efficient and effective. As

discussed in section II.C.9, CEQ also proposes to make a presumptive time limit applicable to EAs in § 1501.10. Further, for some agencies, it is a common practice to have lead and cooperating agencies coordinate in the preparation of EAs where more than one agency may have an action on a proposal; therefore, CEQ also proposes to add EAs to §§ 1501.7 and 1501.8.

CEQ invites comment on these proposed revisions and on whether there are any other aspects of EAs that CEQ should address in its regulations.

6. Findings of No Significant Impact (FONSIs) (§ 1501.6)

When an agency determines in its EA that an EIS is not required, it typically prepares a FONSI. The FONSI reflects that the agency has engaged in the necessary review of environmental impacts under NEPA. The FONSI shows that the agency examined the relevant data and explained the agency findings by providing a rational connection between the facts presented in the EA and the conclusions drawn in the finding. Any finding should clearly identify the facts found and the conclusions drawn by the agency based on those facts.

In response to the ANPRM, CEQ received comments requesting that CEQ update its regulations to consolidate and provide more detailed direction relating to FONSIs. CEQ proposes to consolidate the operative language of 40 CFR 1508.13, ''Finding of no significant impact,'' with 40 CFR 1501.4, ''Whether to prepare an environmental impact statement,'' in the proposed § 1501.6, ''Findings of no significant impact.'' CEQ proposes to strike paragraph (a) as these requirements are addressed in § 1507.3(d)(2). As noted above, paragraph (b) would move to the proposed § 1501.5, ''Environmental assessments.'' This proposed EA section also addresses paragraph (c), so CEQ proposes to strike it from the proposed FONSI section. Similarly, CEQ proposes to strike paragraph (d) because this requirement is addressed in § 1501.9, ''Scoping'' (current 40 CFR 1501.7).

CEQ proposes to make the current 40 CFR 1501.4(e) the new § 1501.6(a), and revise the language to clarify that an agency must prepare a FONSI when it determines that a proposed action will not have significant effects based on the analysis in the EA. CEQ would revise proposed paragraph (a)(2) to clarify that the circumstances listed in paragraph (i) and (ii) are the situations where the agency must make a FONSI available for public review.

CEQ proposes to move the substantive requirement that a FONSI include the EA or a summary from the definition of FONSI (currently 40 CFR 1508.13) to a new paragraph (b). Additionally, CEQ proposes the addition of a new paragraph (c) to address mitigation. Specifically, where mitigation is required under another statute or where an agency is issuing a mitigated FONSI, it would require the agency to include the legal basis for any mitigation adopted.[62] Additionally, it would codify the practice of mitigated FONSIs, consistent with CEQ's Mitigation Guidance, by requiring agencies to document mitigation, including enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.[63] When preparing an EA, many agencies develop, consider, and commit to mitigation measures to avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts that would otherwise require preparation of an EIS. An agency can commit to mitigation measures for a mitigated FONSI when it can ensure that the mitigation will be performed, when the agency expects that resources will be available, and when the agency has sufficient legal authorities to ensure implementation of the proposed mitigation measures. This codification of CEQ guidance is not intended to create a different standard for analysis of mitigation for a ''mitigated FONSI,'' but to provide clarity regarding the use of FONSIs.

7. Lead and Cooperating Agencies (§§ 1501.7 and 1501.8)

In response to the ANPRM, CEQ received comments requesting that CEQ update its regulations to clarify the roles of lead and cooperating agencies. The 1978 CEQ regulations created the roles of lead agency and cooperating agencies for NEPA reviews, which are critical for actions, such as non-Federal projects, requiring the approval or authorization of multiple agencies. Agencies need to coordinate and synchronize their NEPA processes to ensure an efficient environmental review that does not cause delays. In recent years, Congress and several administrations have worked to establish a more synchronized procedure for multi-agency NEPA reviews and related authorizations, including through the development of expedited procedures such as the section 139 process and FAST–41.

CEQ proposes a number of modifications to § 1501.7, ''Lead agencies,'' (current 40 CFR 1501.5), and § 1501.8, ''Cooperating agencies,'' (current 40 CFR 1501.6), to improve interagency coordination, make development of NEPA documents more efficient, and facilitate implementation of the OFD policy. CEQ intends these modifications to improve the efficiency and outcomes of the NEPA process—including cost reduction, improved relationships, and better outcomes that avoid litigation—by promoting environmental collaboration.[64] These modifications are consistent with Questions 14a and 14c of the Forty Questions, *supra* note 10. CEQ proposes to apply §§ 1501.7 and 1501.8 to EAs as well as EISs consistent with agency practice. Consistent with the OFD policy to ensure coordinated and timely reviews, CEQ also proposes to add a § 1501.7(g) to require that Federal agencies evaluate proposals involving multiple Federal agencies in a single EIS and issue a joint ROD[65] or single EA and joint FONSI when practicable. CEQ further proposes to move language from the current cooperating agency provision, 40 CFR 1501.6(a), that addresses the lead agency's responsibilities with respect to cooperating agencies to proposed paragraph (h) in § 1501.7 so that all of the lead agency's responsibilities are in a single section. CEQ also proposes to clarify in paragraph (h)(4) that the lead agency is responsible for determining the purpose and need and alternatives in consultation with any cooperating agencies.[66]

[62] As discussed in sections I.B.1 and II.B, NEPA is a procedural statute and does not require adoption of mitigation. However, agencies may consider mitigation measures that would avoid, minimize, rectify, reduce, or compensate for potentially significant adverse environmental impacts and may require mitigation pursuant to substantive statutes.

[63] The Mitigation Guidance, *supra* note 18, amended and supplemented the Forty Questions, *supra* note 10, specifically withdrawing Question 39 insofar as it suggests that mitigation measures developed during scoping or in an EA ''[do] not obviate the need for an EIS.''

[64] *See, e.g.,* Federal Forum on Environmental Collaboration and Conflict Resolution, Environmental Collaboration and Conflict Resolution (ECCR): Enhancing Agency Efficiency and Making Government Accountable to the People (May 2, 2018), *https://ceq.doe.gov/docs/nepa-practice/ECCR_Benefits_Recommendations_Report_%205-02-018.pdf*.

[65] A ''single ROD,'' as used in E.O. 13807, is the same as a ''joint ROD,'' which is a ROD addressing all Federal agency actions covered in the single EIS and necessary for a proposed project. 40 CFR 1508.25(a)(3). The regulations would provide flexibility for circumstances where a joint ROD is impracticable. Examples include the statutory directive to issue a combined final EIS and ROD for transportation actions and the Federal Energy Regulatory Commission's adjudicatory process.

[66] *See* OFD Framework Guidance, *supra* note 27, § VIII.A.5 (''The lead agency is responsible for developing the Purpose and Need, identifying the range of alternatives to be analyzed, identifying the preferred alternative and determining whether to

Proposed § 1501.7(i) and (j) and § 1501.8(b)(6) and (7) also would require development and adherence to a schedule for the environmental review and any authorizations required for a proposed action, and resolution of disputes and other issues that may cause delays in the schedule. These proposed provisions are consistent with current practices at agencies that have adopted elevation procedures pursuant to various statutes and guidance, including 23 U.S.C. 139, FAST–41, and E.O. 13807.

Proposed paragraph (a) of § 1501.8 would clarify that lead agencies may invite State, Tribal, and local agencies to serve as cooperating agencies by changing ''Federal agency'' to ''agency,'' and moving the operative language from the definition of cooperating agency (40 CFR 1508.5). Non-Federal agencies should participate in the environmental review process to ensure early collaboration on proposed actions where such entities have jurisdiction by law or special expertise. Paragraph (a) would also codify current practice to allow a Federal agency to appeal to CEQ a lead agency's denial of a request to serve as cooperating agency. Resolving disputes among agencies early in the process furthers the OFD policy and the goal of more efficient and timely NEPA reviews. Finally, CEQ proposes edits throughout § 1501.8 to provide further clarity.

8. Scoping (§ 1501.9)

In response to the ANPRM, CEQ received comments requesting that CEQ update its regulations related to scoping, including comments requesting that agencies have greater flexibility in how to conduct scoping. Rather than requiring publication of a NOI as a precondition to the scoping process, CEQ proposes to modify the current 40 CFR 1501.7, ''Scoping,'' in the proposed § 1501.9 so that agencies can begin the scoping process as soon as the proposed action is sufficiently developed for meaningful agency consideration. Some agencies refer to this as pre-scoping under the existing regulations to capture scoping work done before publication of the NOI. Rather than tying the start of scoping to the agency's decision to publish an NOI to prepare an EIS, the timing and content of the NOI would instead become an important step in the scoping process itself, thereby obviating the artificial distinction between scoping and pre-scoping. However, agencies should not unduly delay publication of the NOI.

CEQ also proposes to consolidate all the requirements for the NOI and the scoping process into the same section, reorganize it to discuss the scoping process in chronological order, and add paragraph headings to improve clarity. CEQ proposes to add ''likely'' to proposed paragraph (b) to capture the reality that at the scoping stage, agencies may not know the identities of all affected parties and that one of the purposes of scoping is to identify affected parties. Paragraph (c) would provide agencies additional flexibility in how to reach interested or affected parties in the scoping process. Paragraph (d) would provide a list of what agencies must include in an NOI to standardize NOI format and achieve greater consistency across agencies. This will provide the public with more transparency and ensure that agencies conduct the scoping process in a manner that facilitates implementation of the OFD policy for multi-agency actions, including by proactively soliciting comments on alternatives, impacts, and relevant information to better inform agency decision making. CEQ proposes to move the criteria for determining scope from the definition of scope, 40 CFR 1508.25, to paragraph (e) and to strike the paragraph on ''cumulative actions'' for consistency with the proposed revisions to the definition of ''effects'' discussed below. CEQ also proposes to use the term ''most effective'' rather than ''best'' in § 1501.9(e)(1)(ii) for clarity.

9. Time Limits (§ 1501.10)

In response to the ANPRM, CEQ received many comments on the lengthy timelines and costs of environmental reviews, and many suggestions for more meaningful time limits for the completion of the NEPA process. Accordingly, and to promote timely reviews, CEQ proposes to establish presumptive time limits for EAs and EISs consistent with E.O. 13807 and prior CEQ guidance. In Question 35 of the Forty Questions, *supra* note 10, CEQ stated its expectation that ''even large complex energy projects would require only about 12 months for the completion of the entire EIS process'' and that, for most major actions, ''this period is well within the planning time that is needed in any event, apart from NEPA.'' CEQ also recognized that ''some projects will entail difficult long-term planning and/or the acquisition of certain data which of necessity will require more time for the preparation of the EIS.'' *Id.* Finally, Question 35 stated that an EA ''should take no more than 3 months, and in many cases substantially less as part of the normal analysis and approval process for the action.''

Based on agency experience with the implementation of the regulations, CEQ is proposing in § 1501.10, ''Time limits,'' (current 40 CFR 1501.8) to add a new paragraph (b) to establish a presumptive time limit for EAs of 1 year and a presumptive time limit for EISs of 2 years. CEQ further proposes to provide that a senior agency official may approve in writing a longer time period. These paragraphs would also define the start and end dates of the time period consistent with E.O. 13807. Consistent with CEQ and OMB guidance, agencies should begin scoping and development of a schedule for timely completion of an EIS prior to issuing an NOI and commit to cooperate, communicate, share information, and resolve conflicts that could prevent meeting milestones.[67] CEQ recognizes that agency capacity, including those of cooperating and participating agencies, may affect timing, and that agencies should schedule and prioritize their resources accordingly to ensure effective environmental analyses and public involvement. Further, agencies have flexibility in the management of their internal processes to set shorter time limits and to define the precise start and end times for measuring the completion time of an EA. Therefore, CEQ proposes to retain paragraph (c) regarding factors in determining time limits, but revise paragraph (c)(6) for clarity and strike paragraph (c)(7) because it overlaps with numerous other factors.

CEQ also proposes conforming edits to § 1500.5(g) to change ''setting'' to ''meeting'' time limits and add ''environmental assessment.'' CEQ invites comment on these sections, including on the proposed presumptive timeframes for EAs and EISs, the provisions for management of time limits, and whether the regulations should specify shorter timeframes.

10. Tiering and Incorporation by Reference (§§ 1501.11 and 1501.12)

CEQ proposes to move 40 CFR 1502.21, ''Tiering,'' and 40 CFR 1502.22, ''Incorporation by reference,'' to proposed new §§ 1501.11 and 1501.12, respectively, because these provisions are generally applicable. Specifically, CEQ proposes a number of revisions in § 1501.11 and other paragraphs to clarify when agencies can use existing

develop the preferred alternative to a higher level of detail.''); Connaughton Letter, *supra* note 23 (''[J]oint lead or cooperating agencies should afford substantial deference to the [ ] agency's articulation of purpose and need.'')

[67] *See* OFD Framework Guidance, *supra* note 27 (''[w]hile the actual schedule for any given project may vary based upon the circumstances of the project and applicable law, agencies should endeavor to meet the two-year goal . . . .'').

studies and environmental analyses in the NEPA process and when agencies would need to supplement such studies and analyses. These revisions include updates to the provisions on programmatic reviews (§ 1502.4(d)) and tiering (§ 1501.11) to make clear, among other things, that site-specific analyses need not be conducted prior to an irretrievable commitment of resources, which in most cases will not be until the decision at the site-specific stage. CEQ also proposes to move the operative language from the definition of tiering in 40 CFR 1508.28 to § 1501.11(b).

In addition, CEQ proposes consistency edits to change ''broad'' and ''program'' to ''programmatic'' in §§ 1500.4(k), 1502.4(b), (c), and (d), and 1506.1(c). Further revisions to § 1502.4(b), including eliminating reference to programmatic EISs that ''are sometimes required,'' are intended to focus the provision on the discretionary use of programmatic EISs in support of clearly defined decision-making purposes. As CEQ stated in its 2014 guidance, programmatic NEPA reviews ''should result in clearer and more transparent decision[ ]making, as well as provide a better defined and more expeditious path toward decisions on proposed actions.'' [68] Other statutes or regulations define circumstances under which a programmatic EIS is required. *See, e.g.,* National Forest Management Act, 16 U.S.C. 1604(g). Finally, CEQ proposes a consistency edit in § 1502.4(c)(3) to revise the mandatory language to be discretionary since the regulations do not require programmatic EISs.

D. Proposed Revisions to Environmental Impact Statements (EISs) (Part 1502)

The most extensive level of NEPA analysis is an EIS, which is the ''detailed statement'' required under section 102(2)(C) of NEPA. When an agency prepares an EIS, it typically issues a ROD at the conclusion of the NEPA review. 40 CFR 1505.2. Based on the Environmental Protection Agency (EPA) weekly Notices of Availability published in the **Federal Register** between 2010 and 2018, Federal agencies published approximately 170 final EISs per year. CEQ proposes to update the format, page length, and timeline to complete EISs to better achieve the purposes of NEPA. CEQ also proposes several changes to streamline, provide flexibility, and improve the preparation of EISs. CEQ includes provisions in part 1502 to promote informed decision making by agencies and to inform the public about the decision-making process. The proposed regulations continue to encourage application of NEPA early in the process and early engagement with applicants for non-Federal projects (proposed § 1502.5(b)).

1. Page Limits (§ 1502.7)

In response to the ANPRM, CEQ received many comments on the length, complexity, and readability of environmental documents, and many suggestions for more meaningful page limits. The core purpose of page limits from the original regulations remains—documents must be a reasonable length in a readable format so that it is practicable for the decision maker to read and understand the document in a reasonable period of time. Therefore, CEQ proposes to reinforce the page limits for EISs set forth in § 1502.7, while allowing a senior agency official to approve a statement exceeding 300 pages when it is useful to the decision-making process. As captured in CEQ's report on the length of final EISs, these documents average over 600 pages. *See* Length of Environmental Impact Statements, *supra* note 34. While the length of an EIS will vary based on the complexity and significance of the proposed action and environmental effects the EIS considers, every EIS must be bounded by the practical limits of the decision maker's ability to consider detailed information. CEQ proposes this change to ensure that agencies develop EISs focused on significant effects and on the information useful to the decision makers and the public to more successfully implement NEPA.

CEQ intends for senior agency officials to take responsibility for the quantity, quality, and timelines of environmental analyses developed in support of the decisions of their agencies. Therefore, the senior agency official approving an EA or EIS in excess of the page limits should ensure that the final environmental document meets the informational needs of the agency's decision maker. For example, the agency decision makers may have varying levels of capacity to consider the information presented in the environmental document. In ensuring that the agency provides the resources necessary to implement NEPA, in accordance with 40 CFR 1507.2, senior agency officials should ensure that agency staff have the resources and competencies necessary to produce timely, concise, and effective environmental documents.

2. Draft, Final and Supplemental Statements (§ 1502.9)

CEQ proposes to include sub-headings in § 1502.9, ''Draft, final, and supplemental statements,'' to improve readability. CEQ proposes edits to paragraph (b) for clarity, replacing ''revised draft'' with ''supplemental draft.''

CEQ also received many comments requesting clarification regarding when supplemental statements are required. CEQ proposes revisions to § 1502.9(d)(1) to clarify that agencies need to update environmental documents when there is new information or a change in the proposed action only if a major Federal action remains to occur and other requirements are met. This proposed revision is consistent with Supreme Court case law holding that a supplemental EIS is required only ''[i]f there remains 'major Federal actio[n]' to occur, and if the new information is sufficient to show that the remaining action will 'affec[t] the quality of the human environment' in a significant manner or to a significant extent not already considered . . . .'' *Marsh,* 490 U.S. at 374 (quoting 42 U.S.C. 4332(2)(C)); *see also Norton* v. *S. Utah Wilderness All.,* 542 U.S. 55, 73 (2004). For example, supplementation might be triggered after an agency executes a grant agreement but before construction is complete because the agency has yet to provide all of the funds under that grant agreement. On the other hand, when an agency issues a final rule establishing a regulatory scheme, there is no remaining action to occur, and therefore supplementation is not required. If there is no further agency action after the agency's decision, supplementation does not apply because the Federal agency action is complete. *S. Utah Wilderness All.,* 542 U.S. at 73 (''although the '*[a]pproval* of a [land use plan]' is a 'major Federal action' requiring an EIS . . . that action is completed when the plan is approved. . . . There is no ongoing 'major Federal action' that could require supplementation (though BLM *is* required to perform additional NEPA analyses if a plan is amended or revised . . . .)'') (emphasis in original).

In order to determine whether a supplemental analysis is required, a new paragraph (c)(4) would provide that an agency may document its determination of whether a supplemental analysis is required consistent with its agency NEPA procedures or may, although it is not required, do so in an EA. This provision would codify the existing practice of several Federal agencies, such as the

[68] Programmatics Guidance, *supra* note 20, at 7.

Department of Transportation's reevaluation provided for highway, transit, and railroad projects (23 CFR 771.129); the Bureau of Land Management's Determination of NEPA Adequacy (Department of the Interior Departmental Manual, Part 516, Chapter 11, § 11.6); and the U.S. Army Corps of Engineers' Supplemental Information Report (section 13(d) of Engineering Regulation 200–2–2).

3. EIS Format (§§ 1502.10 and 1502.11)

CEQ proposes to revise § 1502.10, ''Recommended format,'' to provide agencies with more flexibility in formatting an EIS given that most EISs are prepared and distributed electronically. Specifically, CEQ proposes to eliminate the requirement to have a list of agencies, organizations and persons to whom copies of the EIS are sent since EISs are published online, and an index, as this is no longer necessary when most documents are produced in an electronically searchable format. This section would also allow agencies to use a different format so that they may customize EISs to address the particular proposed action and better integrate environmental considerations into agency decision-making processes.

CEQ proposes to amend § 1502.11, ''Cover,'' to remove the reference to a ''sheet'' since agencies prepare EISs electronically. CEQ also proposes to add a requirement to include the estimated cost of preparing the EIS to the cover in new paragraph (g) to provide transparency to the public on the costs of EIS-level NEPA reviews. To track costs, agencies must prepare an estimate of environmental review costs, including costs of the agency's full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs related to the environmental review of the proposed action.[69] For integrated documents where an agency is preparing a document pursuant to multiple environmental statutory requirements, it may indicate that the estimate reflects costs associated with NEPA compliance as well as compliance with other environmental review and authorization requirements. Agencies can develop methodologies for preparing these cost estimates in their implementing procedures.

This amendment will address the concerns raised by the U.S. Government Accountability Office that agencies are not tracking the costs of NEPA analyses, as well as the many comments CEQ received from stakeholders regarding the costs associated with development of NEPA analyses.[70] Including such costs on the cover sheet would also be consistent with current OMB direction to Federal agencies to track costs of environmental reviews and authorizations for major infrastructure projects pursuant to E.O. 13807 and would provide the public with additional information regarding EIS-level NEPA documents.

4. Purpose and Need (§ 1502.13)

CEQ received a number of comments in response to the ANPRM recommending that CEQ better define the requirements for purpose and need statements. The current CEQ regulations require that an EIS ''briefly specify the underlying purpose and need to which the agency is responding in proposing the alternatives including the proposed action.'' 40 CFR 1502.13.

The focus of the purpose and need statement is the purpose and need for the proposed action, and agencies should develop it based on consideration of the relevant statutory authority for the proposed action. The purpose and need statement also provides the framework in which ''reasonable alternatives'' to the proposed action will be identified. CEQ has advised that this discussion of purpose and need should be concise (typically one or two paragraphs long) and that the lead agency is responsible for its definition. *See* Connaughton Letter, *supra* note 23 (''Thoughtful resolution of the purpose and need statement at the beginning of the process will contribute to a rational environmental review process and save considerable delay and frustration later in the decision[-]making process.''). ''In situations involving two or more agencies that have a decision to make for the same proposed action and responsibility to comply with NEPA or a similar statute, it is prudent to jointly develop a purpose and need statement that can be utilized by both agencies. An agreed-upon purpose and need statement at this stage can prevent problems later that may delay completion of the NEPA process.'' *Id.* The lead agency is responsible for developing the purpose and need, and cooperating agencies should give deference to the lead agency and identify any substantive concerns early in the process to ensure swift resolution. *See* OFD Framework Guidance, § VIII.A.5 and XII, *supra* note 27, and Connaughton Letter, *supra* note 23.

Consistent with CEQ guidance and in response to comments, CEQ proposes to revise § 1502.13, ''Purpose and need,'' to clarify that the statement should focus on the purpose and need for the proposed action. In particular, CEQ proposes to strike ''to which the agency is responding in proposing the alternatives including'' to focus on the proposed action. CEQ further proposes, as discussed below, to address the relationship between the proposed action and alternatives in the definition of reasonable alternatives and other sections that refer to alternatives. Additionally, CEQ proposes to add a sentence to clarify that when an agency is responsible for reviewing applications for authorizations, the agency shall base the purpose and need on the applicant's goals and the agency's statutory authority. This addition is consistent with the proposed definition of reasonable alternatives, which must meet the goals of the applicant, where applicable.

5. Alternatives (§ 1502.14)

CEQ also received many comments requesting clarification regarding ''alternatives'' under the regulations. This section of an EIS should describe the proposed action and alternatives in comparative form, including their environmental impacts, such that the decision maker and the public can understand the basis for choice. However, as explained in § 1502.16 and reinforced by Question 7 of the Forty Questions, *supra* note 10, this section of the EIS should not duplicate the affected environment and environmental consequences sections, and agencies have flexibility to combine these three sections in a manner that clearly sets forth the basis for decision making. CEQ proposes a few changes to § 1502.14, ''Alternatives including the proposed action,'' to provide further clarity on the scope of the alternatives analysis in an EIS. CEQ proposes changes to § 1502.14 to simplify and clarify the language, and align it with the format of the related provisions of part 1502.

In paragraph (a), CEQ proposes to delete ''all'' before ''reasonable

[69] *See, e.g.,* U.S. Department of the Interior, Reporting Costs Associated with Developing Environmental Impact Statements (July 23, 2018), *https://www.doi.gov/sites/doi.gov/files/uploads/dep_sec_memo_07232018_-_reporting_costs_associated_w_developing_environmental_impact_statements.pdf*.

[70] In a 2014 report, the U.S. Government Accountability Office found that Federal agencies do not routinely track data on the cost of completing NEPA analyses, and that the cost can vary considerably, depending on the complexity and scope of the project. U.S. Gov't Accountability Office, GAO–14–370, NATIONAL ENVIRONMENTAL POLICY ACT: Little Information Exists on NEPA Analyses (Apr. 15, 2014), *https://www.gao.gov/products/GAO-14-370*. The report referenced the 2003 CEQ task force analysis referenced above which estimated that a typical EIS costs from $250,000 to $2 million. *See* NEPA Task Force Report, *supra* note 16, at p. 65.

alternatives'' and insert afterward ''to the proposed action.'' NEPA itself provides no specific guidance concerning the range of alternatives an agency must consider for each proposal. Section 102(2)(C), provides only that an agency should prepare a detailed statement addressing, among other things, ''alternatives to the proposed action.'' 42 U.S.C. 4332(2)(C). Section 102(2)(E) requires only that agencies ''study, develop, and describe appropriate alternatives to recommended courses of action.'' 42 U.S.C. 4332(2)(E) Implementing this limited statutory direction, CEQ has advised that ''[w]hen there are potentially a very large number of alternatives, only a reasonable number of examples, covering the full spectrum of alternatives, must be analyzed and compared in the EIS.'' Question 1b, Forty Questions, *supra* note 10.

It is CEQ's view that NEPA's policy goals are satisfied when an agency analyzes reasonable alternatives, and that an EIS need not include every available alternative where the consideration of a spectrum of alternatives allows for the selection of any alternative within that spectrum. The reasonableness of the analysis of alternatives in a final EIS is resolved not by any particular number of alternatives considered, but by the nature of the underlying agency action. The discussion of environmental effects of alternatives need not be exhaustive, but must provide information sufficient to permit a reasoned choice of alternatives for the agency to evaluate available reasonable alternatives, 40 CFR 1502.14(a), including significant alternatives that are called to its attention by other agencies, organizations, communities, or a member of the public. Analysis of alternatives also may serve purposes other than NEPA compliance, such as evaluation of the least environmentally damaging practicable alternative for the discharge of dredged or fill material under section 404(b)(1) of the Clean Water Act, 33 U.S.C. 1344(b)(1).

The number of alternatives that is appropriate for an agency to consider will vary. For some actions, such as where the Federal agency's authority to consider alternatives is limited by statute, the range of alternatives may be limited to the proposed action and the no action alternative. For actions where the Federal authority to consider a range of alternatives is broad, the final EIS itself should consider a broader range of reasonable alternatives. However, a process of narrowing alternatives is in accord with NEPA's ''rule of reason'' and common sense—agencies need not reanalyze alternatives previously rejected, particularly when an earlier analysis of numerous reasonable alternatives was incorporated into the final analysis and the agency has considered and responded to public comment favoring other alternatives.

For consistency with this change, CEQ proposes to strike ''the'' before ''reasonable alternatives'' in § 1502.1, and amend § 1502.16, ''Environmental consequences,'' to clarify in proposed paragraph (a)(1) that the discussion must include the environmental impacts of the ''proposed action and reasonable alternatives.''

In response to CEQ's ANPRM, some commenters urged that the regulations should not require agencies to account for impacts over which the agency has no control, including those resulting from alternatives outside its jurisdiction. CEQ proposes to strike paragraph (c) of 40 CFR 1502.14 as a requirement for all EISs because it is not efficient or reasonable to require agencies to develop detailed analyses relating to alternatives outside the jurisdiction of the lead agency. This change is consistent with proposed § 1501.1(a)(2). Further, the proposed definition of ''reasonable alternatives'' would preclude alternatives outside the agency's jurisdiction because they would not be technically feasible due to the agency's lack of statutory authority to implement that alternative. However, an agency may discuss reasonable alternatives not within their jurisdiction when necessary for the agency's decision-making process such as when preparing an EIS to address legislative EIS requirements pursuant to § 1506.8 and to specific Congressional directives. *See* section II.H, *infra,* for further discussion.

A concern raised by many commenters is that agencies have limited resources and that it is important that agencies use those resources effectively. Analyzing a large number of alternatives, particularly where it is clear that only a few alternatives would be economically and technically feasible and realistically implemented by the applicant, can divert limited agency resources. CEQ invites comment on whether the regulations should establish a presumptive maximum number of alternatives for evaluation of a proposed action, or alternatively for certain categories of proposed actions. CEQ seeks comment on (1) specific categories of actions, if any, that should be identified for the presumption or for exceptions to the presumption; and (2) what the presumptive number of alternatives should be (*e.g.,* a maximum of three alternatives including the no action alternative).

6. Affected Environment and Environmental Consequences (§§ 1502.15 and 1502.16)

CEQ proposes in § 1502.15, ''Affected environment,'' to explicitly allow for combining of affected environment and environmental consequences sections to adopt what has become a common practice in some agencies. This revision would ensure that the description of the affected environment is focused on those aspects of the environment that are affected by the proposed action. In proposed paragraph (a)(1) of § 1502.16, ''Environmental consequences,'' CEQ proposes to consolidate into one paragraph the requirement to include a discussion of the effects of the proposed action and reasonable alternatives. The combined discussion should focus on those effects that are reasonably foreseeable and have a close causal relationship to the proposed action, consistent with the proposed revised definition of effects addressed in § 1508.1(g). To align with the statute, CEQ also proposes to add a new § 1502.16(a)(10) to provide that discussion of environmental consequences should include, where applicable, economic and technical considerations consistent with section 102(2)(B) of NEPA.

Further, CEQ proposes to move the operative language that addresses when agencies need to consider economic and social effects in EISs from the definition of human environment in 40 CFR 1508.14 to proposed § 1502.16(b). CEQ also proposes to amend the language for clarity, explain that the agency makes the determination of when consideration of economic and social effects are interrelated with natural or physical environmental effects at which point the agency should give appropriate consideration to those effects, and strike ''all of'' as unnecessary.

7. Submitted Alternatives, Information, and Analyses (§§ 1502.17 and 1502.18)

To ensure agencies have considered all alternatives, information, and analyses submitted by the public, including State, Tribal, and local governments as well as individuals and organizations, CEQ is proposing to add a requirement in § 1502.17 to include a new section in draft and final EISs. This section, called the ''Submitted alternatives, information and analyses'' section, would include a summary of all alternatives, information, and analyses submitted by the public for consideration by the lead and

cooperating agencies in both the draft and final EISs. In developing the summary, agencies may refer to other relevant sections of the draft or final EIS, or to appendices.

To improve the scoping process, CEQ proposes revisions to ensure agencies solicit and consider relevant information early in the development of the draft EIS. As discussed above, CEQ proposes to direct agencies to include a request for identification of alternatives, information, and analyses in the notice of intent (§ 1501.9(d)(7)) and require agencies to summarize all relevant alternatives, information, and analyses submitted by public commenters in the draft and final EIS. CEQ also proposes in § 1502.18, ''Certification of alternatives, information, and analyses section,'' that, based on the alternatives, information, and analyses section required under § 1502.17, the decision maker for the lead agency certify that the agency has considered such information and include the certification in the ROD under § 1505.2(d). In addition, CEQ proposes a conclusive presumption that the agency has considered information summarized in that section because, where agencies have followed the process outlined above, and identified and described information submitted by the public, it is reasonable to presume the agency has considered such information.

8. Other Proposed Changes to Part 1502

CEQ proposes to eliminate the option to circulate the summary of an EIS in § 1502.21, ''Publication of the environmental impact statement,'' given the change from circulation to publication and the reality that most EISs are produced electronically. CEQ proposes to strike the word ''always'' from § 1502.22(a) as unnecessarily limiting and eliminate 40 CFR 1502.22(c) addressing the applicability of the 1986 amendments to 40 CFR 1502.22, ''Incomplete or unavailable information,'' because this paragraph is obsolete. CEQ reiterates, as it stated in the promulgation of this regulation, that the term ''overall cost'' as used in § 1502.22 includes ''financial costs and other costs such as costs in terms of time (delay) and personnel.'' [71] CEQ also proposes in paragraphs (b) and (c) to replace the term ''exorbitant'' with ''unreasonable'' because ''unreasonable'' is more consistent with CEQ's original description of ''overall cost'' considerations, the common understanding of the term, and how the terminology has been interpreted in practice. CEQ invites comment on whether the ''overall costs'' of obtaining incomplete of unavailable information warrants further definition to address whether certain costs are or are not ''unreasonable.''

A proposed revision to § 1502.24, ''Methodology and scientific accuracy,'' would clarify that agencies should use reliable existing information and resources and are not required to undertake new scientific and technical research to inform their analyses. The phrase ''new scientific and technical research'' is intended to distinguish separate and additional research that extends beyond existing scientific and technical information available in the public record or in publicly available academic or professional sources. This phrase is consistent with the requirement in § 1502.22 to obtain incomplete or unavailable information regarding significant adverse effects if the means of obtaining the information is known and the cost to the decision-making process is not unreasonable. Agencies should use their experience and expertise to determine what scientific and technical information is needed to inform their analyses and decision making. CEQ also proposes to revise § 1502.24 to allow agencies to draw on any source of information (such as remote sensing and statistical modeling) that the agency finds reliable and useful to the decision-making process. These changes would promote the use of reliable data, including information gathered using current technologies. Finally, CEQ proposes to revise § 1502.25, ''Environmental review and consultation requirements,'' to clarify that agencies must, to the fullest extent possible, integrate their NEPA analysis with all other applicable Federal environmental review laws and Executive Orders in furtherance of the OFD policy and to make the environmental review process more efficient.[72]

E. Proposed Revisions To Commenting on Environmental Impact Statements (Part 1503)

CEQ proposes to modernize part 1503 given the existence of current technologies not available at the time of the 1978 regulations. In particular, the proposed regulations would encourage agencies to use the current methods of electronic communication both to publish important environmental information and to structure public participation for greater efficiency and inclusion of interested persons. CEQ proposes to revise § 1503.1, ''Inviting comments and requesting information and analyses,'' in proposed paragraph (a)(2)(v) to give agencies flexibility in the public involvement process to solicit comments ''in a manner designed to inform'' parties interested or affected ''by the proposed action.'' CEQ also proposes a new paragraph (a)(3) that requires agencies to specifically invite comment on the completeness of the submitted alternatives, information and analyses section (§ 1502.17). Because interested parties have an affirmative duty to comment during the public review period in order for the agency to consider their positions, *see Vt. Yankee,* 435 U.S. at 553, proposed paragraph (c) would require agencies to provide for commenting using electronic means while ensuring accessibility to those who may not have such access to ensure adequate notice and opportunity to comment.

CEQ also proposes a revision to § 1503.2, ''Duty to comment,'' to clarify that when a cooperating agency with jurisdiction by law specifies measures it considers necessary for a regulatory approval, it should cite its applicable statutory authority to ensure this information is made known to the lead agency.

Further, CEQ proposes to revise paragraph (a) of § 1503.3, ''Specificity of comments and information,'' to explain that the purposes of comments is to promote informed decision making and further clarify that comments should provide sufficient detail for the agency to consider the comment in its decision-making process. *See Pub. Citizen,* 541 U.S. at 764; *Vt. Yankee,* 435 U.S. at 553 (while ''NEPA places upon an agency the obligation to consider every significant aspect of the environmental impact of a proposed action, it is still incumbent upon [parties] who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the [parties'] position . . . .''). CEQ also proposes that comments should explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the environment. *See Vt. Yankee,* 435 U.S. at 553 (''[Comments] must be significant enough to step over a threshold requirement of materiality before any lack of agency response or consideration becomes a concern. The comment cannot merely state that a particular

[71] 51 FR at 15622 (Apr. 25, 1986).

[72] The Permitting Council has compiled a list of environmental laws and Executive Orders that may apply to a proposed action. *See* Federal Environmental Review and Authorization Inventory, *https://www.permits.performance.gov/tools/federal-environmental-review-and-authorization-inventory.*

mistake was made . . . ; it must show why the mistake was of possible significance in the results . . . .'' (quoting *Portland Cement Assn.* v. *Ruckelshaus,* 486 F.2d 375, 394 (1973), cert. denied *sub nom. Portland Cement Corp.* v. *Administrator, EPA,* 417 U.S. 921 (1974))). CEQ also proposes a new § 1503.3(b) to emphasize that comments on the submitted alternatives, information and analyses section should identify any additional alternatives, information or analyses not included in the draft EIS, and should be as specific as possible.

Finally, section 102(2)(C) of NEPA requires that agencies obtain views of Federal agencies with jurisdiction by law or expertise with respect to any environmental impact, and also directs that agencies make copies of the environmental impact statement and the comments and views of appropriate Federal, State, and local agencies available to the President, CEQ and the public. 42 U.S.C. 4332(2)(C). Part 1503 of the CEQ regulations include provisions relating to inviting and responding to comments. In practice, the processing of comments can require substantial time and resources. CEQ proposes to amend § 1503.4, ''Response to comments,'' to simplify and clarify in paragraph (a) that agencies are required to consider substantive comments timely submitted during the public comment period. CEQ also proposes to clarify that an agency may respond to comments individually or collectively. Consistent with this revision, CEQ proposes additionally to clarify that in the final EIS, agencies may respond by a variety of means, and to strike the detailed language in paragraph (a)(5) relating to comments that do not warrant further agency response.

CEQ also proposes to clarify in paragraph (b) that agencies must append comment responses to EISs rather than including them in the body of the EIS, or otherwise publish them. Under current practice, some agencies include these comment responses in the EISs themselves, which can contribute to excessive length. *See* Length of Environmental Impact Statements, *supra* note 34. These changes would not preclude an agency from summarizing or discussing specific comments in the EIS as well.

F. Proposed Revisions to Pre-Decisional Referrals to the Council of Proposed Federal Actions Determined To Be Environmentally Unsatisfactory (Part 1504)

Section 309 of the Clean Air Act (42 U.S.C. 7609) requires the Environmental Protection Agency (EPA) to review and comment on certain proposed actions of other Federal agencies and to make those comments public. Where appropriate, EPA may exercise its authority under section 309(b) of the Clean Air Act and refer the matter to CEQ. CEQ's regulations addressing this referral process are set forth in part 1504.

CEQ proposes edits to part 1504, ''Predecisional Referrals to the Council of Proposed Federal Actions Determined to be Environmentally Unsatisfactory,'' to improve clarity and to add EAs. Though infrequent, CEQ has received referrals on EAs and proposes to capture this practice in the regulations.

CEQ proposes additional revisions to ensure a more timely and efficient process. Consistent with the statute, CEQ proposes to add economic and technical considerations to paragraph (g) of § 1504.2, ''Criteria for referrals.'' In § 1504.3, ''Procedure for referrals and response,'' CEQ proposes changes to simplify and modernize the process. CEQ also proposes a minor revision to the title of part 1504, striking ''Predecision'' and inserting ''Predecisional.''

G. Proposed Revisions to NEPA and Agency Decision Making (Part 1505)

CEQ proposes minor edits to part 1505 for clarity. CEQ proposes to move 40 CFR 1505.1, ''Agency decisionmaking procedures,'' to § 1507.3(b), as discussed further below. CEQ proposes to clarify in the introductory paragraph of § 1505.2, ''Record of decision in cases requiring environmental impact statements,'' in cases requiring EISs, that agencies must ''timely publish'' their RODs. This paragraph also would clarify that ''joint'' RODs by two or more Federal agencies are permitted; this change is also consistent with the OFD policy and E.O. 13807. Finally, CEQ proposes edits in paragraph (c) to change from passive to active voice for clarity.

H. Proposed Revisions to Other Requirements of NEPA (Part 1506)

CEQ proposes a number of edits to part 1506 to improve the NEPA process to make it more efficient and flexible, especially where actions involve third-party applicants. CEQ also proposes several edits for clarity.

In particular, CEQ proposes to add FONSIs to paragraph (a) of § 1506.1, ''Limitations on actions during NEPA process,'' to clarify existing practice and judicial determinations that the limitation on actions applies when an agency is preparing an EA as well as an EIS. CEQ proposes to consolidate paragraph (d) with paragraph (b) and revise the language to provide additional clarity on what activities are allowable during the NEPA process. Specifically, CEQ proposes to eliminate reference to a specific agency in paragraph (d), and provide in paragraph (b) that this section does not preclude certain activities by an applicant to support an application of Federal, State, Tribal or local permits or assistance. As an example of activities an applicant may undertake, CEQ proposes to add ''acquisition of interests in land,'' which would include acquisitions of rights-of-way and conservation easements. CEQ invites comment on whether it should make any additional changes to § 1506.1, including whether there are circumstances under which an agency may authorize irreversible and irretrievable commitments of resources.

A revision to § 1506.2, ''Elimination of duplication with State, Tribal, and local procedures,'' would acknowledge the increasing number of State, Tribal, and local governments conducting NEPA reviews pursuant to assignment from Federal agencies. *See, e.g.,* 23 U.S.C. 327, 25 U.S.C. 4115 and 5389(a). The revision in paragraph (a) would clarify that Federal agencies are authorized to cooperate with such State, Tribal, and local agencies and must do so to reduce duplication under paragraph (b). CEQ proposes to add examples to paragraph (b) to encourage use of prior reviews and decisions. CEQ proposes to modify paragraph (c) to give agencies flexibility to determine whether to cooperate in fulfilling State, Tribal, or local EIS or similar requirements. Finally, CEQ proposes to clarify in paragraph (d) that NEPA does not require reconciliation of inconsistencies between the proposed action and State, Tribal or local plans or laws, although the EIS should discuss the inconsistencies. These revisions would promote efficiency and reduce duplication between Federal and State, Tribal, and local requirements. Other commenters noted that this provision continues to serve an important role given the increased numbers of non-Federal agencies assuming NEPA responsibilities from a Federal agency.

Consistent with current practice by many agencies, the proposed regulations would expand § 1506.3, ''Adoption,'' to expressly cover EAs as well as EISs. CEQ also proposes edits throughout to clarify the process for documenting adoption and the subsequent decision. Finally, paragraph (f) would allow an agency to adopt another agency's determination to apply a CE to a proposed action if the adopting agency's proposed action is substantially the same action. To allow agencies to use

one another's CEs more generally, CEQ also proposes revisions to § 1507.3(e)(5), which would allow agencies to establish a process in their NEPA procedures to adopt another agency's CE.

CEQ also proposes to amend § 1506.4, ''Combining documents,'' to encourage agencies ''to the fullest extent practicable'' to combine their environmental documents with other agency documents to reduce duplication and paperwork. For example, the U.S. Forest Service routinely combines EISs with forest management plans, and agencies may use their NEPA documents to satisfy compliance with section 106 of the National Historic Preservation Act under 36 CFR 800.8.

In response to the ANPRM, commenters urged CEQ to allow greater flexibility for the project sponsor (including private entities) to participate in the preparation of the NEPA documents under the supervision of the lead agency. An update to § 1506.5, ''Agency responsibility for environmental documents,'' would give agencies more flexibility with respect to the preparation of environmental documents while continuing to require agencies to independently evaluate and take responsibility for those documents. Applicants and contractors would be able to assume a greater role in contributing information and material to the preparation of environmental documents, subject to the supervision of the agency. However, agencies would remain responsible for taking reasonable steps to ensure the accuracy of information prepared by applicants and contractors. If a contractor or applicant prepares the document, paragraph (c)(1) would require the decision-making agency official to provide guidance, participate in the preparation, independently evaluate the statement, and take responsibility for its content. These changes are intended to improve communication between proponents of a proposal for agency action and the officials tasked with evaluating the effects of the action and reasonable alternatives, to improve the quality of NEPA documents and efficiency of the NEPA process.

CEQ also proposes to update § 1506.6, ''Public involvement,'' to give agencies greater flexibility to design and customize public involvement to best meet the specific circumstances of their proposed actions. Proposed revisions to paragraph (b)(2) would clarify that agencies may notify any organizations that have requested regular notice. Proposed paragraph (b)(3)(x) would provide for notice through electronic media, but clarify that agencies may not limit public notification to solely electronic methods for actions occurring in whole or in part in areas without high-speed internet access, such as rural locations. CEQ also proposes to amend paragraph (f), which requires that EISs, comments received, and any underlying documents be made available to the public pursuant to the Freedom of Information Act (FOIA) by updating the reference to FOIA, which has been amended numerous times since the enactment of NEPA, mostly recently by the FOIA Improvement Act of 2016, Public Law 114–185. Further, CEQ proposes to strike the remaining text to align paragraph (f) with the text of section 102(2)(C) of NEPA, including with regard to fees. CEQ also proposes to update and modernize § 1506.7, ''Further guidance,'' to state that CEQ may provide further guidance concerning NEPA and its procedures consistent with applicable Executive Orders.

CEQ proposes to consolidate the legislative EIS requirements from the definition of legislation in the current 40 CFR 1508.17 into § 1506.8, ''Proposals for legislation,'' and revise the provision for clarity. Agencies prepare legislative EISs for Congress when they are proposing specific actions such as a legislative proposal for the withdrawal of public lands for military use. *See, e.g.,* Nevada Test and Training Range Military Land Withdrawal Legislative Environmental Impact Statement, Environmental Impact Statements; Notice of Availability, 83 FR 54105 (Oct. 26, 2018).

CEQ also invites comment on whether the legislative EIS requirement should be eliminated or modified because the President proposes legislation, and therefore it is inconsistent with the Recommendations Clause of the U.S. Constitution, which provides the President shall recommend for Congress' consideration ''such [m]easures as he shall judge necessary and expedient . . . .'' U.S. Constitution, Art. II, § 3. The President is not a Federal agency, 40 CFR 1508.12, and the proposal of legislation by the President is not an agency action. *Franklin* v. *Mass.,* 505 U.S. 788, 800–01 (1992).

CEQ also proposes to add a new § 1506.9, ''Proposals for regulations,'' to address the analyses required for rulemakings. This section would clarify that analyses prepared pursuant to other statutory or Executive Order requirements may serve as the functional equivalent of the EIS and be sufficient to comply with NEPA. CEQ proposes in § 1507.3(b)(6) to allow agencies to identify in their agency NEPA procedures documents prepared pursuant to other statutory requirements or Executive Orders that meet the requirements of NEPA.

For some rulemakings, agencies conduct a regulatory impact analysis (RIA), pursuant to E.O. 12866, ''Regulatory Planning and Review,'' [73] that assesses regulatory impacts to air and water quality, ecosystems, and animal habitat, among other environmental factors. E.O. 12866, § 6(a)(3)(C)(i)–(ii). An RIA, alone or in combination with other documents, may serve the purposes of the EIS if (1) there are substantive and procedural standards that ensure full and adequate consideration of environmental issues; (2) there is public participation before a final alternative is selected; and (3) a purpose of the review that the agency is conducting is to examine environmental issues. CEQ proposes § 1506.9 to promote efficiency and reduce duplication in the assessment of regulatory proposals.

The analyses must address the detailed statement requirements specified in section 102(2)(C) of NEPA. More specifically, when those analyses address environmental effects, alternatives, the relationship between short-term uses and long-term productivity, and any irreversible commitments of resources, these analyses may serve as functional equivalents for an EIS. Further, these analyses must balance a clear and express environmental protection purpose with any other variables under consideration, such as economic needs. Finally, that balance must anticipate the advantages and disadvantages of the preparation of a separate EIS.

CEQ invites comments on additional analyses agencies are already conducting that, in whole or when aggregated, can serve as the functional equivalent of the EIS. Aspects of the E.O. 12866 cost benefit analysis may naturally overlap with aspects of the EIS.

CEQ also proposes to update § 1506.10, ''Filing requirements,'' to remove the obsolete process for filing paper copies of EISs with EPA and EPA's delivery of a copy to CEQ, and instead provide for electronic filing, consistent with EPA's procedures. This proposed change would provide flexibility to adapt as EPA changes its processes.

A proposed clause in paragraph (b) would acknowledge the statutory requirement of some agencies to issue a combined final EIS and ROD. *See* 23 U.S.C. 139(n)(2) and 49 U.S.C. 304a(b). Proposed paragraph (c) addresses when

[73] 58 FR 51735 (Oct. 4, 1993).

agencies may make an exception to the current rules set forth in paragraph (b) on timing for issuing a ROD.

Over the last 40 years, CEQ has developed significant experience with NEPA in the context of emergencies and disaster recoveries. Actions following Hurricanes Katrina, Harvey, and Michael, as well as catastrophic wildfires, have given CEQ the opportunity to explore a variety of circumstances where alternative arrangements for complying with NEPA are necessary. CEQ proposes to amend § 1506.12, ''Emergencies,'' to clarify that alternative arrangements are still meant to comply with section 102(2)(C)'s requirement for a ''detailed statement.'' This amendment is consistent with CEQ's longstanding position that it has no authority to exempt Federal agencies from compliance with NEPA, but that CEQ can appropriately provide for exceptions to specific requirements of CEQ's regulations implementing the procedural provisions of NEPA to address extraordinary circumstances that are not addressed by agency implementing procedures previously approved by CEQ. *See* Emergencies Guidance, *supra* note 19. CEQ maintains a public description of all pending and completed alternative arrangements on its website.[74]

Finally, CEQ proposes to modify § 1506.13, ''Effective date,'' to clarify that this regulation would apply to all NEPA processes begun after the effective date, but agencies have the discretion to apply it to ongoing reviews. CEQ also proposes to remove the 1979 effective date of the current regulations and the reference to the 1973 guidance in the current paragraph (a) and strike the current paragraph (b) regarding actions begun before January 1, 1970 because they are obsolete.

I. Proposed Revisions to Agency Compliance (Part 1507)

CEQ proposes modifications to part 1507, which addresses agency compliance with NEPA. The proposed changes would consolidate provisions relating to agency procedures from elsewhere in the CEQ regulations, and add a new section to address the dissemination of information about agency NEPA programs. A proposed change to § 1507.1, ''Compliance,'' would strike the second sentence for consistency with changes to the provisions for agency NEPA procedures at § 1507.3. A proposed change to paragraph (a) of § 1507.2, ''Agency capability to comply,'' would make the senior agency official responsible for coordination, communication, and compliance with NEPA, including resolving implementation issues and representing the agency analysis of the effects of agency actions on the human environment in agency decision-making processes. The proposed § 1507.2(a) would make the senior agency official responsible for addressing disputes among lead and cooperating agencies and enforcing page and time limits. The senior agency official would be responsible for ensuring all environmental documents—even exceptionally lengthy ones—are provided to Federal agency decision makers in a timely, readable, and useful format. CEQ also proposes to clarify in the introductory paragraph that in NEPA compliance an agency may use the ''the resources of other agencies, applicants, and other participants in the NEPA process,'' for which the agency should account. CEQ proposes to amend paragraph (c) to emphasize agency cooperation, which would include commenting. Finally, CEQ proposes to add references to E.O. 11991, which amended E.O. 11514, and E.O. 13807 in paragraph (f) to codify agencies' responsibility to comply with the Order.

In developing their procedures, agencies should strive to identify and apply efficiencies, such as use of applicable CEs, adoption of prior NEPA analyses, and incorporation by reference to prior relevant Federal, State, Tribal, and local analyses, wherever practicable. To facilitate effective and efficient procedures, CEQ proposes to consolidate all of the requirements for agency NEPA procedures in § 1507.3 and add a new § 1507.4 to provide the means of publishing information on ongoing NEPA reviews and agency records relating to NEPA reviews. This includes moving the provisions in § 1505.1, ''Agency decision making procedures,'' to proposed § 1507.3(b); moving the requirement to provide for extraordinary circumstances currently in 40 CFR 1508.4 to proposed § 1507.3(d)(2)(ii); moving the requirement to adopt procedures for introducing a supplement into the agency's administrative record from 40 CFR 1502.9(d)(3) to proposed § 1507.3(d)(3); and moving the allowance to combine the agency's EA process with its scoping process from 40 CFR 1501.7(b)(3) to proposed § 1507.3(e)(4).

CEQ also proposes several revisions to § 1507.3. Revised paragraph (a) would provide agencies the later of 1 year after publication of the final rule or 9 months after the establishment of an agency to develop or revise proposed agency NEPA procedures, as necessary, to implement the CEQ regulations. CEQ also proposes to eliminate the limitations on paraphrasing the CEQ regulations. Agency NEPA procedures should set forth the process by which agencies will comply with NEPA and the CEQ regulations in the context of their particular programs and processes. In addition, CEQ proposes to clarify that except as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in the CEQ regulations.

CEQ proposes to subdivide paragraph (a) into subparagraphs (1) and (2) for additional clarity because each of these is an independent requirement. CEQ proposes to eliminate the recommendation to agencies to issue explanatory guidance and the requirement to review their policies and procedures because the responsibility to revise procedures would be addressed in paragraph (a).

Consistent with the proposed edits to § 1500.1, CEQ proposes to revise paragraph (b) to clarify that agencies should ensure decisions are made in accordance with the Act's procedural requirements and policy of integrating NEPA with other environmental reviews to promote efficient and timely decision making. CEQ proposes a new paragraph (b)(6) to encourage agencies to set forth in their NEPA procedures requirements to combine their NEPA documents with other agency documents, especially where the same or similar analyses are required for compliance with other requirements. Many agencies implement statutes that call for consideration of alternatives to the agency proposal, including the no action alternative, the effects of the agencies' proposal and alternatives, and public involvement. Agencies can use their NEPA procedures to align compliance with NEPA and these other statutory authorities, including provisions for page and time limits that integrate NEPA's goals for informed decision making with agencies' specific statutory requirements. This approach is consistent with some agency practice, but more agencies could use it to achieve greater efficiency and reduce unnecessary duplication. *See, e.g.,* 36 CFR part 220 (U.S. Forest Service NEPA procedures).

Under the proposed § 1507.3(b)(6), agencies may document any agency determination that compliance with the environmental review requirements of other statutes or Executive Orders serves as the functional equivalent of NEPA compliance by identifying that (1) there are substantive and procedural

[74] *https://ceq.doe.gov/nepa-practice/alternative_arrangements.html.*

standards that ensure full and adequate consideration of environmental issues; (2) there is public participation before a final alternative is selected; and (3) a purpose of the review that the agency is conducting is to examine environmental issues. While the courts have found that EPA need not conduct NEPA analyses under a number of statutes that are ''functionally equivalent,'' including the Clean Air Act, the Ocean Dumping Act, the Federal Insecticide, Fungicide, and Rodenticide Act, the Resource Conservation and Recovery Act, and the Comprehensive Environmental Response, Compensation, and Liability Act, CEQ proposes that the concept of functional equivalency be extended to other agencies that conduct analyses to examine environmental issues.

Furthermore, CEQ proposes to add a new paragraph (c), which would provide that agencies may identify actions that are not subject to NEPA in their agency NEPA procedures, including (1) non-major Federal actions; (2) non-discretionary actions, in whole or in part; (3) actions expressly exempt from NEPA under another statute; (4) actions for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute; and (5) actions for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute. These changes would conform to the new § 1501.1, ''NEPA threshold applicability analysis,'' section, which provides five considerations in determining whether NEPA applies to a proposed action.

CEQ proposes to amend paragraph (d)(2)(ii) to require agencies to identify in their procedures when documentation of a CE determination is required. CEQ proposes to add language to paragraph (e)(3) to codify existing agency practice to publish notices when it pauses an EIS or withdraws an NOI. Finally, CEQ proposes to add a new paragraph (e)(5) that would allow agencies to establish a process in their agency NEPA procedures whereby the agency may apply a CE listed in another agency's NEPA procedures. Such procedure would set forth the process by which the agency would consult with the agency that listed the CE in its NEPA procedures to ensure that the application of the CE is consistent with the originating agency's intent and practice.

CEQ invites comment on whether it should specifically allow an agency to apply a categorical exclusion established in another agency's NEPA procedures to its proposed action. CEQ invites comment on any process its regulations should include to ensure the appropriate application of an agency's CE to another agency's action.

Finally, the proposed § 1507.4, ''Agency NEPA program information,'' would require agencies in their NEPA implementing procedures to provide for a website or other means of publishing certain information on ongoing NEPA reviews and maintaining and permitting public access to agency records relating to NEPA reviews. This provision would promote transparency and efficiency in the NEPA process, and improve interagency coordination by ensuring that information is more readily available to other agencies and the public.

Opportunities exist for agencies to combine existing geospatial data, including remotely sensed images, and analyses to streamline environmental review and better coordinate development of environmental documents for multi-agency projects, consistent with the OFD policy. One option involves creating a single NEPA application that facilitates consolidation of existing datasets and can run several relevant geographic information system (GIS) analyses to help standardize the production of robust analytical results. This application could have a public-facing component modeled along the lines of EPA's NEPAssist,[75] which would aid prospective project sponsors with site selection and project design and increase public transparency. The application could link to the Permitting Dashboard to help facilitate project tracking and flexibilities under §§ 1506.5 and 1506.6. CEQ invites comment on this proposal, including comment on whether additional regulatory changes could help facilitate streamlined GIS analysis to help agencies comply with NEPA.

J. Proposed Revisions to Definitions (Part 1508)

CEQ proposes significant revisions to part 1508. CEQ proposes to clarify the definitions of a number of key NEPA terms in order to reduce ambiguity, both through modification of existing definitions and the addition of new definitions. CEQ also proposes to eliminate individual section numbers for each term in favor of an alphabetical list of defined terms in the revised § 1508.1. CEQ proposes conforming edits to remove citations to the specific definition sections throughout the proposed rule. Finally, CEQ proposes to move the operative language included throughout the definitions sections to the relevant substantive sections of the regulations.

New definition of ''authorization.'' CEQ proposes to define the term ''authorization'' to refer to the types of activities that might be required for permitting a proposed action, in particular infrastructure projects. This definition is consistent with the definition included in FAST–41 and E.O. 13807.

Clarifying the meaning of ''categorical exclusion.'' CEQ proposes to revise the definition of categorical exclusion by inserting ''normally'' to clarify that there may be situations where an action may have significant effects on account of extraordinary circumstances. CEQ also proposes to strike ''individually or cumulatively'' for consistency with the proposed revisions to the definition of ''effects'' discussed below. CEQ proposes conforming edits in §§ 1500.4(a) and 1500.5(a). As noted in section II.I, CEQ proposes to move the requirement to provide for extraordinary circumstances in agency procedures to § 1507.3(d)(2)(ii).

Clarifying the meaning of ''cooperating agency.'' CEQ proposes to amend the definition of cooperating agency to make clear that a State, Tribal, or local agency may be a cooperating agency when the lead agency agrees, and to move the corresponding operative language to proposed § 1501.8(a).

Clarifying the meaning of ''effects.'' Many commenters have urged CEQ to refine the definition of effects. Commenters raised concerns that the current definition creates confusion, and that the terms ''indirect'' and ''cumulative'' have been interpreted expansively resulting in excessive documentation about speculative effects and leading to frequent litigation. Commenters also have raised concerns that this has expanded the scope of NEPA analysis without serving NEPA's purpose of informed decision making. Commenters stressed that the focus of the effects analysis should be on those effects that are reasonably foreseeable, related to the proposed action under consideration, and subject to the agency's jurisdiction and control. Commenters also noted that NEPA practitioners often struggle with describing cumulative impacts despite numerous publications on the topic.

While NEPA refers to environmental impacts and environmental effects, it does not subdivide the terms into direct, indirect, or cumulative. To address commenters' concerns and reduce confusion and unnecessary litigation,

[75] *https://nepassisttool.epa.gov/nepassist/nepamap.aspx. See also* the Marine Cadastre, which provides consolidated GIS information for offshore actions, *https://marinecadastre.gov/.*

CEQ proposes to make amendments to simplify the definition of effects by consolidating the definition into a single paragraph and striking the specific references to direct, indirect, and cumulative effects.

In particular, CEQ proposes to amend the definition of effects to provide clarity on the bounds of effects consistent with the Supreme Court's holding in *Department of Transportation* v. *Public Citizen,* 541 U.S. at 767–68. Under the proposed definition, effects must be reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternatives; a ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. This close causal relationship is analogous to proximate cause in tort law. *Id.* at 767; *see also Metro. Edison Co.,* 460 U.S. at 774 (interpreting section 102 of NEPA to require ''a reasonably close causal relationship between a change in the physical environment and the effect at issue'' and stating that ''[t]his requirement is like the familiar doctrine of proximate cause from tort law.''). CEQ seeks comment on whether to include in the definition of effects the concept that the close causal relationship is ''analogous to proximate cause in tort law,'' and if so, how CEQ could provide additional clarity regarding the meaning of this phrase.

CEQ proposes to strike the definition of cumulative impacts and strike the terms ''direct'' and ''indirect'' in order to focus agency time and resources on considering whether an effect is caused by the proposed action rather than on categorizing the type of effect. CEQ's proposed revisions to simplify the definition are intended to focus agencies on consideration of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action. In practice, substantial resources have been devoted to categorizing effects as direct, indirect, and cumulative, which, as noted above, are not terms referenced in the NEPA statute.

In addition, CEQ proposes a change in position to state that analysis of cumulative effects, as defined in CEQ's current regulations, is not required under NEPA. While CEQ has issued detailed guidance on considering cumulative effects, categorizing and determining the geographic and temporal scope of such effects has been difficult and can divert agencies from focusing their time and resources on the most significant effects. Excessively lengthy documentation that does not focus on the most meaningful issues for the decision maker's consideration can lead to encyclopedic documents that include information that is irrelevant or inconsequential to the decision-making process. Instead, agencies should focus their efforts on analyzing effects that are most likely to be potentially significant and be effects that would occur as a result of the agency's decision. Agencies are not expected to conduct exhaustive research on identifying and categorizing actions beyond the agency's control. With this proposed change and the proposed elimination of the definition of cumulative impacts, it is CEQ's intent to focus agencies on analysis of effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action.

To further assist agencies in their assessment of significant effects, CEQ also proposes to clarify that effects should not be considered significant if they are remote in time, geographically remote, or the result of a lengthy causal chain. *See, e.g., Pub. Citizen,* 541 U.S. at 767–68 (''In particular, 'courts must look to the underlying policies or legislative intent in order to draw a manageable line between those causal changes that may make an actor responsible for an effect and those that do not.' '' (quoting *Metro. Edison Co.,* 460 U.S. at 774 n.7)); *Metro. Edison Co.,* 460 U.S. at 774 (noting effects may not fall within section 102 of NEPA because ''the causal chain is too attenuated''). To reinforce CEQ's proposed simplified definition of effects, CEQ proposes to consolidate paragraphs (a), (b), and (d) of 40 CFR 1502.16, ''Environmental consequences,'' into a new § 1502.16(a)(1).

Further, CEQ proposes to codify a key holding of *Public Citizen* relating to the definition of effects to make clear that effects do not include effects that the agency has no authority to prevent or would happen even without the agency action, because they would not have a sufficiently close causal connection to the proposed action. This clarification will help agencies better understand what effects they need to analyze and discuss, helping to reduce delays and paperwork with unnecessary analyses.

CEQ invites comment on the proposed revisions to the definition of effects, including whether CEQ should affirmatively state that consideration of indirect effects is not required.

Clarifying the meaning of ''environmental assessment.'' CEQ proposes to revise the definition of environmental assessment, describing the purpose for the document and moving all of the operative language from the definition to proposed § 1501.5.

Clarifying the meaning of ''Federal agency.'' CEQ proposes to amend the definition of ''Federal agency'' to broaden it to include States, Tribes, and units of local government to the extent that they have assumed NEPA responsibilities from a Federal agency pursuant to statute. Since the issuance of the CEQ regulations, Congress has authorized assumption of NEPA responsibilities in other contexts besides the Housing and Community Development Act of 1974. *See, e.g.,* Surface Transportation Project Delivery Program, 23 U.S.C. 327. This change would acknowledge these programs and help clarify roles and responsibilities.

Clarifying the meaning of ''human environment.'' CEQ proposes to change ''people'' to ''present and future generations of Americans'' consistent with section 101(a) of NEPA.

Clarifying the meaning of ''lead agency.'' CEQ proposes to amend the definition of lead agency to clarify that this term includes joint lead agencies, which are an acceptable practice.

Clarifying the meaning of ''legislation.'' CEQ proposes to move the operative language to § 1506.8 and strike the example of treaties, because, as noted in section II.H, the President is not a Federal agency, and therefore a request for ratification of a treaty would not be subject to NEPA.

Clarifying the meaning of ''major Federal action.'' CEQ received many comments requesting clarification of the definition of major Federal action. For example, CEQ received comments proposing that non-Federal projects should not be considered major Federal actions based on a very minor Federal role. Commenters also recommended that CEQ clarify the definition to exclude decisions where agencies do not have discretion to consider and potentially modify their actions based on the environmental review.

CEQ proposes to amend the first sentence of the definition to clarify that an action meets the definition if it is subject to Federal control and responsibility, and it has effects that may be significant. CEQ proposes to replace ''major'' effects with ''significant'' in this sentence to align with the NEPA statute.

CEQ proposes to strike the second sentence of the definition, which provides ''Major reinforces but does not have a meaning independent of significantly.'' This is a change in position as compared to CEQ's earlier interpretation of NEPA. In the statute, Congress refers to ''major Federal actions significantly affecting the quality of the human environment.'' 42 U.S.C. 4332(2)(C). Under the current

interpretation, however, the word ''major'' is rendered virtually meaningless.

CEQ proposes to strike the sentence because all words of a statute must be given meaning consistent with longstanding principles of statutory interpretation. *See, e.g., Bennett,* 520 U.S. at 173 (''It is the '''cardinal principle of statutory construction'' . . . [that] it is our duty ''to give effect, if possible, to every clause and word of a statute'' . . . rather than to emasculate an entire section.' '' (quoting *United States* v. *Menasche,* 348 U.S. 528, 538 (1955))). The legislative history of NEPA also reflects that Congress used the term ''major'' independently of ''significantly,'' and provided that, for major actions, agencies should make a determination as to whether the proposal would have a significant environmental impact. Specifically, the Senate Report for the National Environmental Policy Act of 1969 states, ''*Each agency which proposes any major actions,* such as project proposals, proposals for new legislation, regulations, policy statements, or expansion or revision of ongoing programs, *shall make a determination as to whether the proposal would have a significant effect upon the quality of the human environment.*'' S. Rep. No. 91–296, at 20 (1969) (emphasis added).[76] Moreover, over the past four decades, in a number of cases, courts have determined that NEPA does not require the preparation of an EIS for actions with minimal Federal involvement or funding. Under this proposed definition, these would be non-major Federal actions.

To clarify that these activities are non-major Federal actions, CEQ proposes to add two sentences to the definition to make clear that this term does not include non-Federal projects with minimal Federal funding or minimal Federal involvement such that the agency cannot control the outcome on the project. In such circumstances, there is no practical reason for an agency to conduct a NEPA analysis because the agency could not influence the outcome of its action to address the effects of the project. For example, this might include a very small percentage of Federal funding provided only to help design an infrastructure project that is otherwise funded through private or local funds. This change would help to reduce costs and delays by more clearly defining the kinds of actions that are appropriately within the scope of NEPA.

[76] *https://ceq.doe.gov/docs/laws-regulations/Senate-Report-on-NEPA.pdf.*

CEQ also proposes to strike the third sentence of the definition, which includes a failure to act in the definition of a major Federal action, and exclude activities that do not result in final agency action under the APA. NEPA applies when agencies are considering a proposal for decision. In the circumstance described in this sentence, there is no proposed action and therefore no alternatives that the agency may consider. *S. Utah Wilderness All.,* 542 U.S. at 70–73.

CEQ also proposes to strike the specific reference to the State and Local Fiscal Assistance Act of 1972 from paragraph (a). The proposed revisions to the definition clarify that general revenue sharing funds would not meet the definition of major Federal action. In particular, CEQ proposes to exclude as non-major Federal actions the farm ownership and operating loan guarantees provided by the Farm Service Agency (FSA) of the U.S. Department of Agriculture pursuant to 7 U.S.C. 1925 and 1941 through 1949, and the business loan guarantee programs of the Small Business Administration (SBA), 15 U.S.C. 636(a), 636(m), and 695 through 697f. Under the farm ownership and operating loan programs, FSA does not control the bank, or the borrower; the agency does not control the subsequent use of such funds and does not operate any facilities. In the event of a default, properties are sold, and FSA never takes physical possession of, operates, or manages any facility. SBA's business loan programs operate in similar fashion. Further, under those programs no Federal funds are expended unless there is a default by the borrower paying the loan.

CEQ invites comment on whether it should make any further changes to this paragraph, including changing ''partly'' to ''predominantly'' for consistency with the edits to the introductory paragraph regarding ''minimal Federal funding.'' CEQ also invites comment whether there should be a threshold (percentage or dollar figure) for ''minimal Federal funding,'' and if so, what would be an appropriate threshold and the basis for such a threshold. CEQ also invites comment on whether any types of financial instruments, including loans and loan guarantees, should be considered non-major Federal actions and the basis for such exclusion.

Additionally, as a general matter, CEQ invites comment on whether the definition of ''major Federal action'' should be further revised to exclude other *per se* categories of activities or to further address what NEPA analysts have called ''the small handle problem.'' [77] Commenters should provide any relevant data that may assist in identifying such categories of activities. Finally, as noted in the discussion of § 1501.4, CEQ invites comment on whether and how to exclude certain categories of actions common to all Federal agencies from the definition.

CEQ also proposes to insert ''implementation of'' before ''treaties'' in paragraph (b)(1) to clarify that the major Federal action is not the treaty itself, but rather an agency's action to implement that treaty. Further, CEQ proposes to strike ''guide'' from paragraph (b)(2) because guidance is non-binding.

CEQ also invites comment on whether the regulations should clarify that NEPA does not apply extraterritorially, consistent with *Kiobel* v. *Royal Dutch Petroleum Co.,* 569 U.S. 108, 115–16 (2013), in light of the ordinary presumption against extraterritorial application when a statute does not clearly indicate that extraterritorial application is intended by Congress.

Clarifying the meaning of ''mitigation.'' CEQ proposes to amend the definition of ''mitigation'' to define the term and clarify that NEPA does not require adoption of any particular mitigation measure, consistent with *Methow Valley,* 490 U.S. at 352–53. In *Methow Valley,* the Supreme Court held that NEPA and the CEQ regulations require ''that mitigation be discussed in sufficient detail to ensure that environmental consequences have been fairly evaluated,'' but do not establish ''a substantive requirement that a complete mitigation plan be actually formulated and adopted'' before the agency can make its decision. *Id.* at 352.

CEQ also proposes to amend the definition of ''mitigation'' to make clear that mitigation must have a nexus to the effects of the proposed action, is limited to those actions that have an effect on the environment, and does not include actions that do not have an effect on the environment. This would make the NEPA process more effective by clarifying that mitigation measures must actually be designed to mitigate the effects of the proposed action. This amended definition is consistent with CEQ's Mitigation Guidance, *supra* note 18.

Under that guidance, if an agency believes that the proposed action will provide net environmental benefits through use of compensatory mitigation, the agency should incorporate by

[77] *See* Daniel R. Mandelker et al., NEPA Law and Litigation, § 8:20 (2d ed. 2019) (''This problem is sometimes called the 'small handle' problem because [F]ederal action may be only be a 'small handle' on a non[-F]ederal project.'').

reference the documents that demonstrate that the proposed mitigation will be new or in addition to actions that would occur under the no-action alternative, and the financial, legal, and management commitments for the mitigation. Use of well-established mitigation banks and similar compensatory mitigation legal structures should provide the necessary substantiation for the agency's findings on the effectiveness (nexus to effects of the action, proportionality, and durability) of the mitigation. Other actions may be effectively mitigated through use of environmental management systems that provide a structure of procedures and policies to systematically identify, evaluate, and manage environmental impacts of an action during its implementation.[78]

Clarifying the meaning of ''notice of intent.'' CEQ proposes to revise the definition of ''notice of intent'' to remove the operative requirements for the NOI and add the word ''public'' to clarify that the NOI is a public notice.

New definition of ''page.'' A new definition of ''page'' would provide a word count (500 words) for a more standard functional definition of ''page'' for page count and other NEPA purposes. This would update NEPA for modern electronic publishing and internet formatting, in which the number of words per page can vary widely depending on format. It would also ensure some uniformity in document length while allowing unrestricted use of the graphic display of quantitative information, tables, photos, maps, and other geographic information that can provide a much more effective means of conveying information about environmental effects. This change supports the original CEQ page limits as a means of ensuring that environmental documents are readable and useful to decision makers.

New definition of ''participating agency.'' As discussed above, CEQ proposes to add the concept of a participating agency to the CEQ regulations. CEQ proposes to define participating agency consistent with the definition in FAST–41 and 23 U.S.C. 139. CEQ proposes to add participating agencies to § 1501.7(i) regarding the schedule and replace the term ''commenting'' agencies with ''participating'' agencies throughout.

Clarifying the meaning of ''proposal.'' CEQ proposes clarifying edits and to strike the operative language regarding timing of an EIS because it is already addressed in § 1502.5.

New definition of ''publish/publication.'' CEQ proposes to define this term to provide agencies with the flexibility to make environmental reviews and information available to the public by electronic means. The 1978 regulations predate personal computers and a wide range of technologies now used by agencies such as GIS mapping tools and social media. To address environmental justice concerns and ensure that the affected public is not excluded from the NEPA process due to a lack of resources (often referred to as the ''digital divide''), the definition retains a provision for printed environmental documents where necessary for effective public participation.

New definition of ''reasonable alternative.'' Several commenters asked CEQ to include a new definition of ''reasonable alternatives'' in the regulations with emphasis on how technical and economic feasibility should be evaluated. CEQ proposes a new definition of ''reasonable alternative'' that would provide that reasonable alternatives must be technically and economically feasible and meet the purpose and need of the proposed action. *See, e.g., Vt. Yankee,* 435 U.S. at 551 (''alternatives must be bounded by some notion of feasibility''). CEQ also proposes to define reasonable alternatives as ''a reasonable range of alternatives'' to codify Questions 1a and 1b in the Forty Questions, *supra* note 10. Agencies are not required to give detailed consideration to alternatives that are unlikely to be implemented because they are infeasible, ineffective, or inconsistent with the purpose and need for agency action.

Finally, CEQ proposes to clarify that a reasonable alternative must also consider the goals of the applicant when the agency's action involves a non-Federal entity. These changes would help reduce paperwork and delays by helping to clarify the range of alternatives that agencies must consider. Where the agency action is in response to an application for permit or other authorization, the agency should consider the applicant's goals based on the agency's statutory authorization to act, as well as in other congressional directives, in defining the proposed action's purpose and need.

New definition of ''reasonably foreseeable.'' CEQ received comment requesting that the regulations provide a definition of ''reasonably foreseeable.'' CEQ proposes to define ''reasonably foreseeable'' consistent with the ordinary person standard—that is what a person of ordinary prudence would consider in reaching a decision.

New definition of ''senior agency official.'' As discussed in section II.A, the proposed definition of ''senior agency official'' would provide for agency officials that are responsible for the agency's NEPA compliance.

Striking the definition of ''significantly.'' Because the entire definition of significantly is operative language, CEQ proposes to strike this definition and discuss significance in § 1501.4(b), as described above.

Clarifying the meaning of ''tiering.'' CEQ would amend the definition of ''tiering'' to make clear that agencies may use EAs at the programmatic stage as well as the subsequent stages. This would clarify that agencies have flexibility in structuring programmatic NEPA reviews and associated tiering. CEQ would move the operative language regarding tiering from 40 CFR 1508.28 to proposed § 1501.11(b).

K. CEQ Guidance Documents

This proposed rule, if adopted as a final rule, would supersede any previous CEQ NEPA guidance. If CEQ finalizes the proposed rule, CEQ anticipates withdrawing all of the CEQ NEPA guidance that is currently in effect and issuing new guidance as consistent with Presidential directives.

L. Additional Issues on Which CEQ Invites Comment

Based on comments received and CEQ's experience in implementing NEPA, the final rule may include amendments to any provisions in parts 1500 to 1508 of the CEQ regulations. CEQ invites comments recommending, opposing, or providing feedback on specific changes to any provisions in parts 1500 to 1508 of the CEQ regulations, including revising or adopting as regulations existing CEQ guidance or handbooks.

Further, CEQ received comments requesting that the regulations address analysis of greenhouse gas emissions and potential climate change impacts. CEQ has proposed guidance titled ''Draft National Environmental Policy Act Guidance on Consideration of Greenhouse Gas Emissions'' [79] to address how NEPA analyses should address greenhouse gas (GHG) emissions. CEQ does not consider it appropriate to address a single category of impacts in the regulations. If CEQ finalizes this proposal, CEQ would review the draft GHG guidance for potential revisions consistent with the

[78] *See* Council on Environmental Quality, Aligning National Environmental Policy Act Processes with Environmental Management Systems (April 2007), *https://ceq.doe.gov/docs/ceq-publications/NEPA_EMS_Guide_final_Apr2007.pdf.*

[79] 84 FR 30097 (June 26, 2019).

regulations. However, CEQ invites comments on whether it should codify any aspects of its proposed GHG guidance in the regulation, and if so, how CEQ should address them in the regulations.

If proposed changes to the CEQ regulations provided in comments on the ANPRM, or on the proposed GHG guidance, are not reflected in this proposal, and the commenter would like to advance those proposals in comments to the NPRM, CEQ requests that the commenter specifically identify and reference to the prior comment.

Finally, CEQ invites comment on whether to update references to ''Council'' in the regulation to ''CEQ'' throughout the rule.

III. Rulemaking Analyses and Notices

A. Executive Order 12866, Regulatory Planning and Review; Executive Order 13563, Improving Regulation and Regulatory Review; and Executive Order 13771, Reducing Regulation and Controlling Regulatory Costs

This proposed rule is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. The docket for this rulemaking documents any changes made in response to OMB recommendations as required by section 6 of E.O. 12866.

B. Regulatory Flexibility Act and Executive Order 13272, Proper Consideration of Small Entities in Agency Rulemaking

The Regulatory Flexibility Act, as amended, (RFA), 5 U.S.C. 601 *et seq.,* and E.O. 13272 [80] require agencies to assess the impacts of proposed and final rules on small entities. Under the RFA, small entities include small businesses, small organizations, and small governmental jurisdictions. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a proposed rule, if promulgated, would not have a significant economic impact on a substantial number of small entities. The proposed rule would not directly regulate small entities. Rather, the proposed rule applies to Federal agencies and sets forth the process for their compliance with NEPA. Accordingly, CEQ hereby certifies that the proposed rule, if promulgated, will not have a significant economic impact on a substantial number of small entities.

[80] 67 FR 53461 (Aug. 16, 2002).

C. National Environmental Policy Act

This proposed rule, if finalized, would assist agencies in fulfilling their responsibilities under NEPA, but would not make any final determination of what level of NEPA analysis is required for particular actions. The CEQ regulations do not require agencies to prepare a NEPA analysis before establishing or updating agency procedures for implementing NEPA. While CEQ prepared environmental assessments for its promulgation of the CEQ regulations in 1978 and its amendments to 40 CFR 1502.22 in 1986, in the development of this proposed rule, CEQ has determined that the proposed rule would not have a significant effect on the environment because it would not authorize any activity or commit resources to a project that may affect the environment. Therefore, CEQ does not intend to conduct a NEPA analysis of this proposed rule for the same reason that CEQ does not require any Federal agency to conduct NEPA analysis for the development of agency procedures for the implementation of NEPA and the CEQ regulations.

D. Executive Order 13132, Federalism

E.O. 13132 requires agencies to develop an accountable process to ensure meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.[81] Policies that have federalism implications include regulations that have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. CEQ does not anticipate that this proposed rule has federalism implications because it applies to Federal agencies, not States.

E. Executive Order 13175, Consultation and Coordination With Indian Tribal Governments

E.O. 13175 requires agencies to have a process to ensure meaningful and timely input by Tribal officials in the development of policies that have Tribal implications.[82] Such policies include regulations that have substantial direct effects on one or more Indian Tribes, on the relationship between the Federal Government and Indian Tribes, or on the distribution of power and responsibilities between the Federal Government and Indian Tribes. While the proposed rule is not a regulatory policy that has Tribal implications, the proposal does, in part, respond to Tribal government comments supporting expansion of the recognition of the sovereign rights, interests, and expertise of Tribes in the NEPA process and CEQ regulations implementing NEPA.

In its ANPRM, CEQ included a specific question regarding the representation of Tribal governments in the NEPA process. *See* ANPRM Question 18 (''Are there ways in which the role of [T]ribal governments in the NEPA process should be clarified in CEQ's NEPA regulations, and if so, how?''). More generally, CEQ's ANPRM sought the views of Tribal governments and others on regulatory revisions that CEQ could propose to improve Tribal participation in Federal NEPA processes. *See* ANPRM Question 2 (''Should CEQ's NEPA regulations be revised to make the NEPA process more efficient by better facilitating agency use of environmental studies, analysis, and decisions conducted in earlier Federal, State, Tribal or local environmental reviews or authorization decisions, and if so, how?''). As discussed section II.A, CEQ now proposes to amend its regulations to further support coordination with Tribal governments and agencies and analysis of a proposed action's potential effects on Tribal lands, resources, or areas of historic significance as an important part of Federal agency decision making. In addition to these proposed revisions of the CEQ Regulations, CEQ is inviting comment on other CEQ guidance that warrants codification. *See, e.g.,* CEQ Memorandum titled ''Designation of Non-Federal Agencies to be Cooperating Agencies in Implementing the Procedural Requirements of the National Environmental Policy Act'' [83] (July 28, 1999) encouraging more active solicitation of Tribal entities for participation as cooperating agencies in NEPA documents.

F. Executive Order 12898, Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

E.O. 12898 requires agencies to make achieving environmental justice part of its mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of its programs, policies, and activities on minority populations and low-income populations.[84] CEQ has

[81] 64 FR 43255 (Aug. 10, 1999).

[82] 65 FR 67249 (Nov. 9, 2000).

[83] *https://ceq.doe.gov/docs/ceq-regulations-and-guidance/regs/ceqcoop.pdf.*

[84] 59 FR 7629 (Feb. 16, 1994).

analyzed this proposed rule and determined that it would not cause disproportionately high and adverse human health or environmental effects on minority populations and low-income populations. This rule would set forth implementing regulations for NEPA; it is in the agency implementation of NEPA when conducting reviews of proposed agency actions where consideration of environmental justice effects typically occurs.

G. Executive Order 13211, Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

Agencies must prepare a Statement of Energy Effects for significant energy actions under E.O. 13211.[85] This proposed rule is not a ''significant energy action'' because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

H. Executive Order 12988, Civil Justice Reform

Under section 3(a) E.O. 12988,[86] agencies must review their proposed regulations to eliminate drafting errors and ambiguities, draft them to minimize litigation, and provide a clear legal standard for affected conduct. Section 3(b) provides a list of specific issues for review to conduct the reviews required by section 3(a). CEQ has conducted this review and determined that this proposed rule complies with the requirements of E.O. 12988.

I. Unfunded Mandate Reform Act

Section 201 of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531) requires Federal agencies to assess the effects of their regulatory actions on State, local, and Tribal governments, and the private sector to the extent that such regulations incorporate requirements specifically set forth in law. Before promulgating a rule that may result in the expenditure by a State, local, or Tribal government, in the aggregate, or by the private sector of $100 million, adjusted annually for inflation, in any 1 year, an agency must prepare a written statement that assesses the effects on State, local, and Tribal governments and the private sector. 2 U.S.C. 1532. This proposed rule applies to Federal agencies and would not result in expenditures of $100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any 1 year. This action also does not impose any enforceable duty, contain any unfunded mandate, or otherwise have any effect on small governments subject to the requirements of 2 U.S.C. 1531–1538.

J. Paperwork Reduction Act

This proposed rule does not impose any new information collection burden that would require additional review or approval by OMB under the Paperwork Reduction Act (PRA), 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Parts 1500 Through 1508

Administrative practice and procedure; Environmental impact statements; Environmental protection; Natural resources.

Dated: December 23, 2019.

Mary B. Neumayr,

Chairman.

For the reasons discussed in the preamble, the Council on Environmental Quality proposes to amend parts 1500 through 1508 in title 40 of the Code of Federal Regulations to read as follows:

■ 1. Revise part 1500 to read as follows:

PART 1500—PURPOSE AND POLICY

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1500.1 Purpose and policy.

(a) The National Environmental Policy Act (NEPA) is a procedural statute intended to ensure Federal agencies consider the environmental impacts of their actions in the decision-making process. Section 101 of NEPA establishes the national environmental policy of the Federal Government to use all practicable means and measures to foster and promote the general welfare, create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans. Section 102(2) of NEPA establishes the procedural requirements to carry out the policy stated in section 101 of NEPA. In particular, it requires Federal agencies to provide a detailed statement on proposals for major Federal actions significantly affecting the quality of the human environment. The purpose and function of NEPA is satisfied if Federal agencies have considered relevant environmental information and the public has been informed regarding the decision making process. NEPA does not mandate particular results or substantive outcomes. NEPA's purpose is not to generate paperwork or litigation, but to provide for informed decision making and foster excellent action.

(b) The regulations in parts 1500 through 1508 implement section 102(2) of NEPA. They provide direction to Federal agencies to determine what actions are subject to NEPA's procedural requirements and the level of NEPA review where applicable. These regulations are intended to ensure that relevant environmental information is identified and considered early in the process in order to ensure informed decision making by Federal agencies. The regulations are also intended to ensure that Federal agencies conduct environmental reviews in a coordinated, consistent, predictable and timely manner, and to reduce unnecessary burdens and delays. Finally, the regulations promote concurrent environmental reviews to ensure timely and efficient decision making.

§ 1500.2 [Reserved]

§ 1500.3 NEPA compliance.

(a) *Mandate.* Parts 1500 through 1508 of this title are applicable to and binding on all Federal agencies for implementing the procedural provisions of the National Environmental Policy Act of 1969, as amended (Pub. L. 91–190, 42 U.S.C. 4321 *et seq.*) (NEPA or the Act), except where compliance would be inconsistent with other statutory requirements. These regulations are issued pursuant to NEPA; the Environmental Quality Improvement Act of 1970, as amended (Pub. L. 91–224, 42 U.S.C. 4371 *et seq.*); section 309 of the Clean Air Act, as amended (42 U.S.C. 7609); Executive Order 11514, Protection and Enhancement of Environmental Quality (March 5, 1970), as amended by Executive Order 11991, Relating to the Protection and Enhancement of Environmental Quality (May 24, 1977); and Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 15, 2017). These regulations apply to the whole of section 102(2) of NEPA. The provisions of the Act and of these regulations must be read together as a whole to comply with the law. Agency NEPA procedures to implement

[85] 66 FR 28355 (May 22, 2001).

[86] 61 FR 4729 (Feb. 7, 1996).

these regulations shall not impose additional procedures or requirements beyond those set forth in these regulations, except as otherwise provided by law or for agency efficiency.

(b) *Exhaustion.* (1) To ensure informed decision making and reduce delays, agencies shall include a request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment in the notice of intent to prepare an environmental impact statement (§ 1501.9).

(2) The environmental impact statement shall include a summary of the comments received, including all alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement (§ 1502.17).

(3) For consideration by the lead and cooperating agencies, comments must be submitted within the comment periods provided and shall be as specific as possible (§§ 1503.1 and 1503.3). Comments or objections not submitted shall be deemed unexhausted and forfeited. Any objections to the submitted alternatives, information, and analyses section (§ 1502.17) shall be submitted within 30 days of the notice of availability of the final environmental impact statement.

(4) Based on the summary of the submitted alternatives, information, and analyses section, the decision maker for the lead agency shall certify in the record of decision that the agency considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement (§ 1502.18).

(c) *Actions regarding NEPA compliance.* It is the Council's intention that judicial review of agency compliance with the regulations in parts 1500 through 1508 not occur before an agency has issued the record of decision or taken other final agency action. Any allegation of noncompliance with NEPA and these regulations should be resolved as expeditiously as possible. Agencies may structure their decision making to allow private parties to seek agency stays of final agency decisions pending administrative or judicial review of those decisions. Consistent with their organic statutes, agencies may structure their procedures to provide for efficient mechanisms for seeking, granting and imposing conditions on such stays, consistent with 5 U.S.C. 705. Such mechanisms may include the imposition of an appropriate bond requirement or other security requirement as a condition for a stay.

(d) *Remedies.* Harm from the failure to comply with NEPA can be remedied by compliance with NEPA's procedural requirements as interpreted in the regulations in parts 1500 through 1508. These regulations create no presumption that violation of NEPA is a basis for injunctive relief or for a finding of irreparable harm. These regulations do not create a cause of action or right of action for violation of NEPA, which contains no such cause of action or right of action. It is the Council's intention that any actions to review, enjoin, stay, or alter an agency decision on the basis of an alleged NEPA violation be raised as soon as practicable to avoid or minimize any costs to agencies, applicants, or any affected third parties. It is also the Council's intention that minor, non-substantive errors that have no effect on agency decision making shall be considered harmless and shall not invalidate an agency action.

(e) *Severability.* The sections of parts 1501 through 1508 are separate and severable from one another. If any section or portion therein is stayed or determined to be invalid, or the applicability of any section to any person or entity is held invalid, it is the Council's intention that the validity of the remainder of those parts shall not be affected, with the remaining sections to continue in effect.

§ 1500.4 Reducing paperwork.

Agencies shall reduce excessive paperwork by:

(a) Using categorical exclusions to define categories of actions which do not have a significant effect on the human environment and which are therefore exempt from requirements to prepare an environmental impact statement (§ 1501.4).

(b) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment and is therefore exempt from requirements to prepare an environmental impact statement (§ 1501.6).

(c) Reducing the length of environmental documents by means such as meeting appropriate page limits (§§ 1501.5(e) and 1502.7).

(d) Preparing analytic and concise environmental impact statements (§ 1502.2).

(e) Discussing only briefly issues other than significant ones (§ 1502.2(b)).

(f) Writing environmental impact statements in plain language (§ 1502.8).

(g) Following a clear format for environmental impact statements (§ 1502.10).

(h) Emphasizing the portions of the environmental impact statement that are useful to decision makers and the public (§§ 1502.14 and 1502.15) and reducing emphasis on background material (§ 1502.16).

(i) Using the scoping process, not only to identify significant environmental issues deserving of study, but also to deemphasize insignificant issues, narrowing the scope of the environmental impact statement process accordingly (§ 1501.9).

(j) Summarizing the environmental impact statement (§ 1502.12).

(k) Using programmatic, policy, or plan environmental impact statements and tiering from statements of broad scope to those of narrower scope, to eliminate repetitive discussions of the same issues (§§ 1502.4 and 1501.11).

(l) Incorporating by reference (§ 1501.12).

(m) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(n) Requiring comments to be as specific as possible (§ 1503.3).

(o) Attaching and publishing only changes to the draft environmental impact statement, rather than rewriting and publishing the entire statement when changes are minor (§ 1503.4(c)).

(p) Eliminating duplication with State, Tribal, and local procedures, by providing for joint preparation of environmental documents where practicable (§ 1506.2), and with other Federal procedures, by providing that an agency may adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(q) Combining environmental documents with other documents (§ 1506.4).

§ 1500.5 Reducing delay.

Agencies shall reduce delay by:

(a) Using categorical exclusions to define categories of actions which do not have a significant effect on the human environment (§ 1501.4) and which are therefore exempt from requirements to prepare an environmental impact statement.

(b) Using a finding of no significant impact when an action not otherwise excluded will not have a significant effect on the human environment (§ 1501.6) and is therefore exempt from requirements to prepare an environmental impact statement.

(c) Integrating the NEPA process into early planning (§ 1501.2).

(d) Engaging in interagency cooperation before the environmental assessment or environmental impact statement is prepared, rather than submission of comments on a completed document (§ 1501.8).

(e) Ensuring the swift and fair resolution of lead agency disputes (§ 1501.7).

(f) Using the scoping process for an early identification of what are and what are not the real issues (§ 1501.9).

(g) Meeting appropriate time limits for the environmental assessment and environmental impact statement processes (§ 1501.10).

(h) Preparing environmental impact statements early in the process (§ 1502.5).

(i) Integrating NEPA requirements with other environmental review and consultation requirements (§ 1502.25).

(j) Eliminating duplication with State, Tribal, and local procedures by providing for joint preparation of environmental documents where practicable (§ 1506.2) and with other Federal procedures by providing that agencies may jointly prepare or adopt appropriate environmental documents prepared by another agency (§ 1506.3).

(k) Combining environmental documents with other documents (§ 1506.4).

(l) Using accelerated procedures for proposals for legislation (§ 1506.8).

§ 1500.6 Agency authority.

Each agency shall interpret the provisions of the Act as a supplement to its existing authority and as a mandate to view policies and missions in the light of the Act's national environmental objectives. Agencies shall review their policies, procedures, and regulations accordingly and revise them as necessary to ensure full compliance with the purposes and provisions of the Act as interpreted by the regulations in parts 1500 through 1508. The phrase ''to the fullest extent possible'' in section 102 of NEPA means that each agency of the Federal Government shall comply with that section unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible. Nothing contained in the regulations in parts 1500 through 1508 is intended or should be construed to limit an agency's other authorities or legal responsibilities.

■ 2. Revise part 1501 to read as follows:

PART 1501—NEPA AND AGENCY PLANNING

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1501.1 NEPA threshold applicability analysis.

(a) In assessing whether NEPA applies, Federal agencies should determine:

(1) Whether the proposed action is a major Federal action.

(2) Whether the proposed action, in whole or in part, is a non-discretionary action for which the agency lacks authority to consider environmental effects as part of its decision-making process.

(3) Whether the proposed action is an action for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute.

(4) Whether the proposed action is an action for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute.

(5) Whether the proposed action is an action for which the agency has determined that other analyses or processes under other statutes serve the function of agency compliance with NEPA.

(b) Federal agencies may make these determinations in their agency NEPA procedures (§ 1507.3(c)) or on an individual basis.

§ 1501.2 Apply NEPA early in the process.

(a) Agencies should integrate the NEPA process with other planning and authorization processes at the earliest reasonable time to ensure that agencies consider environmental impacts in their planning and decisions, to avoid delays later in the process, and to head off potential conflicts.

(b) Each agency shall:

(1) Comply with the mandate of section 102(2)(A) of NEPA to ''utilize a systematic, interdisciplinary approach which will [e]nsure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment,'' as specified by § 1507.2.

(2) Identify environmental effects and values in adequate detail so they can be appropriately considered along with economic and technical analyses. Agencies shall review and publish environmental documents and appropriate analyses at the same time as other planning documents.

(3) Study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources as provided by section 102(2)(E) of NEPA.

(4) Provide for cases where actions that are subject to NEPA are planned by private applicants or other non-Federal entities before Federal involvement so that:

(i) Policies or designated staff are available to advise potential applicants of studies or other information foreseeably required for later Federal action.

(ii) The Federal agency consults early with appropriate State, Tribal, and local governments and with interested private persons and organizations when its own involvement is reasonably foreseeable.

(iii) The Federal agency commences its NEPA process at the earliest reasonable time.

§ 1501.3 Determine the appropriate level of NEPA review.

(a) In assessing the appropriate level of NEPA review, Federal agencies should determine whether the proposed action:

(1) Normally does not have significant effects and is categorically excluded (§ 1501.4);

(2) Is not likely to have significant effects or the significance of the effects is unknown and is therefore appropriate for an environmental assessment (§ 1501.5); or

(3) Is likely to have significant effects and is therefore appropriate for an environmental impact statement (part 1502).

(b) In considering whether the effects of the proposed action are significant, agencies shall analyze the potentially affected environment and degree of the effects of the action.

(1) In considering the potentially affected environment, agencies may consider, as appropriate, the affected area (national, regional, or local). Significance varies with the setting of the proposed action. For instance, in the case of a site-specific action, significance would usually depend upon the effects in the locale rather than in the Nation as a whole. Both short- and long-term effects are relevant.

(2) In considering the degree of the effects, agencies should consider the

following, as appropriate to the specific action:

(i) Effects may be both beneficial and adverse.

(ii) Effects on public health and safety.

(iii) Effects that would violate Federal, State, Tribal, or local law protecting the environment.

§ 1501.4 Categorical exclusions.

(a) For efficiency, agencies identify in their agency NEPA procedures (§ 1507.3(d)(2)(ii)) categories of actions that normally do not have a significant effect on the human environment, and therefore do not require preparation of an environmental assessment or environmental impact statement.

(b) If an agency determines that a proposed action is covered by a categorical exclusion identified in its agency NEPA procedures, the agency shall evaluate the action for extraordinary circumstances in which a normally excluded action may have a significant effect.

(1) If extraordinary circumstances are present for a proposed action, the agency should consider whether mitigating circumstances or other conditions are sufficient to avoid significant effects and therefore categorically exclude the proposed action.

(2) If the proposed action cannot be categorically excluded, the agency shall prepare an environmental assessment or environmental impact statement.

§ 1501.5 Environmental assessments.

(a) An agency shall prepare an environmental assessment for a proposed action that is not likely to have significant effects or when the significance of the effects is unknown unless the agency finds that a categorical exclusion (§ 1501.4) is applicable or has decided to prepare an environmental impact statement.

(b) An agency may prepare an environmental assessment on any action in order to assist agency planning and decision making.

(c) An environmental assessment shall:

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact; and

(2) Briefly discuss the purpose and need for the proposed action, alternatives as required by section 102(2)(E) of NEPA, the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

(d) Agencies shall involve relevant agencies, applicants, and the public, to the extent practicable in preparing environmental assessments.

(e) The text of an environmental assessment shall be no more than 75 pages, not including appendices, unless a senior agency official approves in writing an assessment to exceed 75 pages and establishes a new page limit.

(f) Agencies may apply the following provisions to environmental assessments:

(1) Section 1502.22 Incomplete or unavailable information;

(2) Section 1502.24 Methodology and scientific accuracy; and

(3) Section 1502.25 Environmental review and consultation requirements.

§ 1501.6 Findings of no significant impact.

(a) An agency shall prepare a finding of no significant impact if the agency determines, based on the environmental assessment, not to prepare an environmental impact statement because the proposed action is not likely to have significant effects.

(1) The agency shall make the finding of no significant impact available to the affected public as specified in § 1506.6.

(2) In the following circumstances, the agency shall make the finding of no significant impact available for public review for 30 days before the agency makes its final determination whether to prepare an environmental impact statement and before the action may begin:

(i) The proposed action is, or is closely similar to, one which normally requires the preparation of an environmental impact statement under the procedures adopted by the agency pursuant to § 1507.3, or

(ii) The nature of the proposed action is one without precedent.

(b) The finding of no significant impact shall include the environmental assessment or incorporate it by reference and shall note any other environmental documents related to it (§ 1501.9(f)(3)). If the assessment is included, the finding need not repeat any of the discussion in the assessment but may incorporate it by reference.

(c) The finding of no significant impact shall state the means of and authority for any mitigation that the agency has adopted, and any applicable monitoring or enforcement provisions. If the agency finds no significant impacts based on mitigation, the mitigated finding of no significant impact shall state any enforceable mitigation requirements or commitments that will be undertaken to avoid significant impacts.

§ 1501.7 Lead agencies.

(a) A lead agency shall supervise the preparation of an environmental impact statement or environmental assessment if more than one Federal agency either:

(1) Proposes or is involved in the same action; or

(2) Is involved in a group of actions directly related to each other because of their functional interdependence or geographical proximity.

(b) Federal, State, Tribal, or local agencies, including at least one Federal agency, may act as joint lead agencies to prepare an environmental impact statement or environmental assessment (§ 1506.2).

(c) If an action falls within the provisions of paragraph (a) of this section, the potential lead agencies shall determine, by letter or memorandum, which agency shall be the lead agency and which shall be cooperating agencies. The agencies shall resolve the lead agency question so as not to cause delay. If there is disagreement among the agencies, the following factors (which are listed in order of descending importance) shall determine lead agency designation:

(1) Magnitude of agency's involvement.

(2) Project approval/disapproval authority.

(3) Expertise concerning the action's environmental effects.

(4) Duration of agency's involvement.

(5) Sequence of agency's involvement.

(d) Any Federal agency, or any State, Tribal, or local agency or private person substantially affected by the absence of lead agency designation, may make a written request to the senior agency officials of the potential lead agencies that a lead agency be designated.

(e) If Federal agencies are unable to agree on which agency will be the lead agency or if the procedure described in paragraph (c) of this section has not resulted within 45 days in a lead agency designation, any of the agencies or persons concerned may file a request with the Council asking it to determine which Federal agency shall be the lead agency. A copy of the request shall be transmitted to each potential lead agency. The request shall consist of:

(1) A precise description of the nature and extent of the proposed action.

(2) A detailed statement of why each potential lead agency should or should not be the lead agency under the criteria specified in paragraph (c) of this section.

(f) A response may be filed by any potential lead agency concerned within 20 days after a request is filed with the Council. The Council shall determine as soon as possible but not later than 20 days after receiving the request and all responses to it which Federal agency shall be the lead agency and which

other Federal agencies shall be cooperating agencies.

(g) To the extent practicable, if a proposal will require action by more than one Federal agency and the lead agency determines that it requires preparation of an environmental impact statement, the lead and cooperating agencies shall evaluate the proposal in a single environmental impact statement and issue a joint record of decision. To the extent practicable, if the lead agency determines that the proposed action should be evaluated in an environmental assessment, the lead and cooperating agencies should evaluate the proposal in a single environmental assessment and, where appropriate, issue a joint finding of no significant impact.

(h) With respect to cooperating agencies, the lead agency shall:

(1) Request the participation of each cooperating agency in the NEPA process at the earliest practicable time.

(2) Use the environmental analysis and proposals of cooperating agencies with jurisdiction by law or special expertise, to the maximum extent practicable, consistent with its responsibility as lead agency.

(3) Meet with a cooperating agency at the latter's request.

(4) Determine the purpose and need, and alternatives in consultation with any cooperating agency.

(i) The lead agency shall develop a schedule, setting milestones for all environmental reviews and authorizations required for implementation of the action, in consultation with any applicant and all joint lead, cooperating, and participating agencies, as soon as practicable.

(j) If the lead agency anticipates that a milestone will be missed, it shall notify appropriate officials at the responsible agencies. The responsible agencies shall elevate, as soon as practicable, to the appropriate officials of the responsible agencies, the issue for timely resolution.

§ 1501.8 Cooperating agencies.

(a) The purpose of this section is to emphasize agency cooperation early in the NEPA process. Any Federal agency with jurisdiction by law shall be a cooperating agency upon request of the lead agency. In addition, any other Federal agency with special expertise with respect to any environmental issue may be a cooperating agency upon request of the lead agency. A State, Tribal, or local agency of similar qualifications may, by agreement with the lead agency, become a cooperating agency. An agency may request the lead agency to designate it a cooperating agency, and a Federal agency may appeal a denial of its request to the Council, in accordance with § 1501.7(e).

(b) Each cooperating agency shall:

(1) Participate in the NEPA process at the earliest practicable time.

(2) Participate in the scoping process (described in § 1501.9).

(3) Assume, on request of the lead agency, responsibility for developing information and preparing environmental analyses, including portions of the environmental impact statement or environmental assessment concerning which the cooperating agency has special expertise.

(4) Make available staff support at the lead agency's request to enhance the latter's interdisciplinary capability.

(5) Normally use its own funds. To the extent available funds permit, the lead agency shall fund those major activities or analyses it requests from cooperating agencies. Potential lead agencies shall include such funding requirements in their budget requests.

(6) Consult with the lead agency in developing the schedule (§ 1501.7(i)), meet the schedule, and elevate, as soon as practicable, to the senior agency official of the lead agency relating to purpose and need, alternatives or any other issues any issues that may affect that agency's ability to meet the schedule.

(7) Meet the lead agency's schedule for providing comments and limit its comments to those matters for which it has jurisdiction by law or special expertise with respect to any environmental issue consistent with § 1503.2.

(c) In response to a lead agency's request for assistance in preparing the environmental documents (described in paragraph (b)(3), (4), or (5) of this section), a cooperating agency may reply that other program commitments preclude any involvement or the degree of involvement requested in the action that is the subject of the environmental impact statement or environmental assessment. The cooperating agency shall submit a copy of this reply to the Council and the senior agency official of the lead agency.

§ 1501.9 Scoping.

(a) *Generally.* Agencies shall use an early and open process to determine the scope of issues for analysis in an environmental impact statement, including identifying the significant issues and eliminating from further study non-significant issues. Scoping may begin as soon as practicable after the proposal for action is sufficiently developed for agency consideration. Scoping may include appropriate pre-application procedures or work conducted prior to publication of the notice of intent.

(b) *Invite cooperating and participating agencies.* As part of the scoping process, the lead agency shall invite the participation of likely affected Federal, State, Tribal, and local agencies and governments, the proponent of the action, and other likely affected or interested persons (including those who might not be in accord with the action on environmental grounds), unless there is a limited exception under § 1507.3(e).

(c) *Scoping outreach.* As part of the scoping process the lead agency may hold a scoping meeting or meetings, publish scoping information, or use other means to communicate with those persons or agencies who may be interested or affected, which the agency may integrate with any other early planning meeting. Such a scoping meeting will often be appropriate when the impacts of a particular action are confined to specific sites.

(d) *Notice of intent.* As soon as practicable after determining that a proposal is sufficiently developed to allow for meaningful public comment and requires an environmental impact statement, the lead agency shall publish a notice of intent to prepare an environmental impact statement in the **Federal Register,** except as provided in § 1507.3(e)(3). An agency may publish notice in accordance with § 1506.6. The notice shall include, as appropriate:

(1) The purpose and need for the proposed action;

(2) A preliminary description of the proposed action and alternatives to be considered;

(3) A brief summary of expected impacts;

(4) Anticipated permits and other authorizations;

(5) A schedule for the decision-making process;

(6) A description of the public scoping process, including any scoping meeting(s);

(7) A request for comments on potential alternatives and impacts, and identification of any relevant information, studies, or analyses of any kind concerning impacts affecting the quality of the human environment (§§ 1503.1 and 1503.3); and

(8) Contact information for a person within the agency who can answer questions about the proposed action and the environmental impact statement.

(e) *Determination of scope.* As part of the scoping process, the lead agency shall determine the scope and the significant issues to be analyzed in depth in the environmental impact

statement. To determine the scope of environmental impact statements, agencies shall consider:

(1) Actions (other than unconnected single actions) that may be:

(i) Connected actions, which means that they are closely related and therefore should be discussed in the same impact statement. Actions are connected if they:

(A) Automatically trigger other actions that may require environmental impact statements;

(B) Cannot or will not proceed unless other actions are taken previously or simultaneously; or

(C) Are interdependent parts of a larger action and depend on the larger action for their justification.

(ii) Similar actions, which when viewed with other reasonably foreseeable or proposed agency actions, have similarities that provide a basis for evaluating their environmental consequences together, such as common timing or geography. An agency may wish to analyze these actions in the same impact statement. It should do so when the most effective way to assess adequately the combined impacts of similar actions or reasonable alternatives to such actions is to treat them in a single impact statement.

(2) Alternatives, which include the no action alternative; other reasonable courses of action; and mitigation measures (not in the proposed action).

(3) Impacts.

(f) *Additional scoping responsibilities.* As part of the scoping process, the lead agency shall:

(1) Identify and eliminate from detailed study the issues which are not significant or which have been covered by prior environmental review (§ 1506.3), narrowing the discussion of these issues in the statement to a brief presentation of why they will not have a significant effect on the human environment or providing a reference to their coverage elsewhere.

(2) Allocate assignments for preparation of the environmental impact statement among the lead and cooperating agencies, with the lead agency retaining responsibility for the statement.

(3) Indicate any public environmental assessments and other environmental impact statements which are being or will be prepared that are related to but are not part of the scope of the impact statement under consideration.

(4) Identify other environmental review, authorization, and consultation requirements so the lead and cooperating agencies may prepare other required analyses and studies concurrently with, and integrated with, the environmental impact statement as provided in § 1502.25.

(5) Indicate the relationship between the timing of the preparation of environmental analyses and the agencies' tentative planning and decision-making schedule.

(g) *Revisions.* An agency shall revise the determinations made under paragraphs (b), (c), (e), and (f) of this section if substantial changes are made later in the proposed action, or if significant new circumstances or information arise which bear on the proposal or its impacts.

§ 1501.10 Time limits.

(a) To ensure that agencies conduct NEPA reviews as efficiently and expeditiously as practicable, Federal agencies should set time limits appropriate to individual actions or types of actions (consistent with the time intervals required by § 1506.11). When multiple agencies are involved the reference to agency below means lead agency.

(b) To ensure timely decision making, agencies shall complete:

(1) Environmental assessments within 1 year unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. One year is measured from the date of decision to prepare an environmental assessment to the publication of a final environmental assessment.

(2) Environmental impact statements within 2 years unless a senior agency official of the lead agency approves a longer period in writing and establishes a new time limit. Two years is measured from the date of the issuance of the notice of intent to the date a record of decision is signed.

(c) The senior agency official may consider the following factors in determining time limits:

(1) Potential for environmental harm.

(2) Size of the proposed action.

(3) State of the art of analytic techniques.

(4) Degree of public need for the proposed action, including the consequences of delay.

(5) Number of persons and agencies affected.

(6) Availability of relevant information.

(7) Other time limits imposed on the agency by law, regulations, or Executive order.

(d) The senior agency official may set overall time limits or limits for each constituent part of the NEPA process, which may include:

(1) Decision on whether to prepare an environmental impact statement (if not already decided).

(2) Determination of the scope of the environmental impact statement.

(3) Preparation of the draft environmental impact statement.

(4) Review of any comments on the draft environmental impact statement from the public and agencies.

(5) Preparation of the final environmental impact statement.

(6) Review of any comments on the final environmental impact statement.

(7) Decision on the action based in part on the environmental impact statement.

(e) The agency may designate a person (such as the project manager or a person in the agency's office with NEPA responsibilities) to expedite the NEPA process.

(f) State, Tribal, or local agencies or members of the public may request a Federal agency to set time limits.

§ 1501.11 Tiering.

(a) Agencies are encouraged to tier their environmental impact statements and environmental assessments where it would eliminate repetitive discussions of the same issues, focus on the actual issues ripe for decision, and exclude from consideration issues already decided or not yet ripe at each level of environmental review. Whenever an agency has prepared an environmental impact statement or environmental assessment for a program or policy and then prepares a subsequent statement or environmental assessment on an action included within the entire program or policy (such as a project- or site-specific action), the subsequent statement or environmental assessment need only summarize the issues discussed in the broader statement and incorporate discussions from the broader statement by reference and shall concentrate on the issues specific to the subsequent action. The subsequent document shall state where the earlier document is available. Tiering may also be appropriate for different stages of actions.

(b) Tiering is appropriate when the sequence from an environmental impact statement or environmental assessment is:

(1) From a programmatic, plan, or policy environmental impact statement or environmental assessment to a program, plan, or policy statement or assessment of lesser or narrower scope or to a site-specific statement or assessment.

(2) From an environmental impact statement or environmental assessment on a specific action at an early stage (such as need and site selection) to a supplement (which is preferred) or a subsequent statement or assessment at a

later stage (such as environmental mitigation). Tiering in such cases is appropriate when it helps the lead agency to focus on the issues that are ripe for decision and exclude from consideration issues already decided or not yet ripe.

§ 1501.12 Incorporation by reference.

Agencies shall incorporate material into environmental documents by reference when the effect will be to cut down on bulk without impeding agency and public review of the action. The incorporated material shall be cited in the document and its content briefly described. No material may be incorporated by reference unless it is reasonably available for inspection by potentially interested persons within the time allowed for comment. Material based on proprietary data which is itself not available for review and comment shall not be incorporated by reference.

■ 3. Revise part 1502 to read as follows:

PART 1502—ENVIRONMENTAL IMPACT STATEMENT

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1502.1 Environmental impact statement purpose.

The primary purpose of an environmental impact statement prepared pursuant to 102(2)(c) is to ensure agencies consider the environmental impacts of their actions in decision making. It shall provide full and fair discussion of significant environmental impacts and shall inform decision makers and the public of reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment. Agencies shall focus on significant environmental issues and alternatives and shall reduce paperwork and the accumulation of extraneous background data. Statements shall be concise, clear, and to the point, and shall be supported by evidence that the agency has made the necessary environmental analyses. An environmental impact statement is a document that informs. Federal agency decision making.

§ 1502.2 Implementation.

(a) Environmental impact statements shall not be encyclopedic.

(b) Impacts shall be discussed in proportion to their significance. There shall be only brief discussion of other than significant issues. As in a finding of no significant impact, there should be only enough discussion to show why more study is not warranted.

(c) Environmental impact statements shall be analytic, concise, and no longer than necessary to comply with NEPA and with the regulations in parts 1500 through 1508. Length should be proportional to potential environmental effects and project size.

(d) Environmental impact statements shall state how alternatives considered in it and decisions based on it will or will not achieve the requirements of sections 101 and 102(1) of NEPA and other environmental laws and policies.

(e) The range of alternatives discussed in environmental impact statements shall encompass those to be considered by the ultimate agency decision maker.

(f) Agencies shall not commit resources prejudicing selection of alternatives before making a final decision (§ 1506.1).

(g) Environmental impact statements shall serve as the means of assessing the environmental impact of proposed agency actions, rather than justifying decisions already made.

§ 1502.3 Statutory requirements for statements.

As required by section 102(2)(C) of NEPA, environmental impact statements are to be included in every Federal agency recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment.

§ 1502.4 Major Federal actions requiring the preparation of environmental impact statements.

(a) Agencies shall define the proposal that is the subject of an environmental impact statement based on the statutory authorities for the proposed action. Agencies shall use the criteria for scope (§ 1501.9) to determine which proposal(s) shall be the subject of a particular statement. Agencies shall evaluate in a single environmental impact statement proposals or parts of proposals that are related to each other closely enough to be, in effect, a single course of action.

(b) Environmental impact statements may be prepared for programmatic Federal actions such as the adoption of new agency programs. Agencies shall prepare statements on programmatic actions so that they are relevant to the program decision and time them to coincide with meaningful points in agency planning and decision making.

(c) When preparing statements on programmatic actions (including proposals by more than one agency), agencies may find it useful to evaluate the proposal(s) in one of the following ways:

(1) Geographically, including actions occurring in the same general location, such as body of water, region, or metropolitan area.

(2) Generically, including actions which have relevant similarities, such as common timing, impacts, alternatives, methods of implementation, media, or subject matter.

(3) By stage of technological development including Federal or federally assisted research, development or demonstration programs for new technologies which, if applied, could significantly affect the quality of the human environment. Statements on such programs should be available before the program has reached a stage of investment or commitment to implementation likely to determine subsequent development or restrict later alternatives.

(d) Agencies shall as appropriate employ scoping (§ 1501.9), tiering (§ 1501.11), and other methods listed in §§ 1500.4 and 1500.5 to relate programmatic and narrow actions and to avoid duplication and delay. Agencies may tier their environmental analyses to defer detailed analysis of environmental impacts of specific program elements until such program elements are ripe for

decisions that would involve an irreversible or irretrievable commitment of resources.

§ 1502.5 Timing.

An agency should commence preparation of an environmental impact statement as close as practicable to the time the agency is developing or is presented with a proposal so that preparation can be completed in time for the final statement to be included in any recommendation or report on the proposal. The statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made (§§ 1501.2 and 1502.2). For instance:

(a) For projects directly undertaken by Federal agencies the environmental impact statement shall be prepared at the feasibility analysis (go-no go) stage and may be supplemented at a later stage if necessary.

(b) For applications to the agency, appropriate environmental assessments or statements shall be commenced as soon as practicable after the application is received. Federal agencies should work with potential applicants and applicable State, Tribal, and local agencies prior to receipt of the application.

(c) For adjudication, the final environmental impact statement shall normally precede the final staff recommendation and that portion of the public hearing related to the impact study. In appropriate circumstances the statement may follow preliminary hearings designed to gather information for use in the statements.

(d) For informal rulemaking the draft environmental impact statement shall normally accompany the proposed rule.

§ 1502.6 Interdisciplinary preparation.

Environmental impact statements shall be prepared using an interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts (section 102(2)(A) of NEPA). The disciplines of the preparers shall be appropriate to the scope and issues identified in the scoping process (§ 1501.9).

§ 1502.7 Page limits.

The text of final environmental impact statements (*e.g.,* paragraphs (a)(4) through (6) of § 1502.10) shall be 150 pages or fewer and, for proposals of unusual scope or complexity, shall be 300 pages or fewer unless a senior agency official of the lead agency approves in writing a statement to exceed 300 pages and establishes a new page limit.

§ 1502.8 Writing.

Environmental impact statements shall be written in plain language and may use appropriate graphics so that decision makers and the public can readily understand them. Agencies should employ writers of clear prose or editors to write, review, or edit statements, which will be based upon the analysis and supporting data from the natural and social sciences and the environmental design arts.

§ 1502.9 Draft, final, and supplemental statements.

(a) *Generally.* Except for proposals for legislation as provided in § 1506.8 environmental impact statements shall be prepared in two stages and, where necessary, shall be supplemented as provided in paragraph (d)(1) of this section.

(b) *Draft environmental impact statements.* Draft environmental impact statements shall be prepared in accordance with the scope decided upon in the scoping process. The lead agency shall work with the cooperating agencies and shall obtain comments as required in part 1503 of this chapter. The draft statement must meet, to the fullest extent practicable, the requirements established for final statements in section 102(2)(C) of NEPA. If a draft statement is so inadequate as to preclude meaningful analysis, the agency shall prepare and publish a supplemental draft of the appropriate portion. The agency shall discuss at appropriate points in the draft statement all major points of view on the environmental impacts of the alternatives including the proposed action.

(c) *Final environmental impact statements.* Final environmental impact statements shall address comments as required in part 1503 of this chapter. The agency shall discuss at appropriate points in the final statement any responsible opposing view which was not adequately discussed in the draft statement and shall indicate the agency's response to the issues raised.

(d) *Supplemental environmental impact statements.* Agencies:

(1) Shall prepare supplements to either draft or final environmental impact statements if a major Federal action remains to occur, and:

(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or

(ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.

(2) May also prepare supplements when the agency determines that the purposes of the Act will be furthered by doing so.

(3) Shall prepare, publish, and file a supplement to a statement in the same fashion (exclusive of scoping) as a draft and final statement unless alternative procedures are approved by the Council.

(4) May find that changes to the proposed action or new circumstances or information relevant to environmental concerns are not significant and therefore do not require a supplement. The agency should document the finding consistent with its agency NEPA procedures (§ 1507.3), or, if necessary, in a finding of no significant impact supported by an environmental assessment.

§ 1502.10 Recommended format.

(a) Agencies shall use a format for environmental impact statements which will encourage good analysis and clear presentation of the alternatives including the proposed action. Agencies should use the following standard format for environmental impact statements unless the agency determines that there is a more effective format for communication:

(1) Cover.

(2) Summary.

(3) Table of contents.

(4) Purpose of and need for action.

(5) Alternatives including proposed action (sections 102(2)(C)(iii) and 102(2)(E) of NEPA).

(6) Affected environment and environmental consequences (especially sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA).

(7) Submitted, alternatives, information, and analyses.

(8) List of preparers.

(9) Appendices (if any).

(b) If an agency uses a different format, it shall include paragraphs (a), (b), (c), (d), (e), (f), (g) and (h) of this section, as further described in §§ 1502.11 through 1502.20, in any appropriate format.

§ 1502.11 Cover.

The cover shall not exceed one page and include:

(a) A list of the responsible agencies, including the lead agency and any cooperating agencies.

(b) The title of the proposed action that is the subject of the statement (and, if appropriate, the titles of related cooperating agency actions), together with the State(s) and county(ies) (or other jurisdiction, if applicable) where the action is located.

(c) The name, address, and telephone number of the person at the agency who can supply further information.

(d) A designation of the statement as a draft, final, or draft or final supplement.

(e) A one-paragraph abstract of the statement.

(f) The date by which comments must be received (computed in cooperation with EPA under § 1506.11).

(g) The estimated total cost of preparing the environmental impact statement, including the costs of agency full-time equivalent (FTE) personnel hours, contractor costs, and other direct costs.

§ 1502.12 Summary.

Each environmental impact statement shall contain a summary which adequately and accurately summarizes the statement. The summary shall stress the major conclusions, areas of disputed issues raised by agencies and the public), and the issues to be resolved (including the choice among alternatives). The summary will normally not exceed 15 pages.

§ 1502.13 Purpose and need.

The statement shall briefly specify the underlying purpose and need for the proposed action. When an agency's statutory duty is to review an application for authorization, the agency shall base the purpose and need on the goals of the applicant and the agency's authority.

§ 1502.14 Alternatives including the proposed action.

This section should present the environmental impacts of the proposed action and the alternatives in comparative form based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences (§ 1502.16). In this section, agencies shall:

(a) Evaluate reasonable alternatives to the proposed action, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for their having been eliminated.

(b) Discuss each alternative considered in detail including the proposed action so that reviewers may evaluate their comparative merits.

(c) Include the no action alternative.

(d) Identify the agency's preferred alternative or alternatives, if one or more exists, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.

(e) Include appropriate mitigation measures not already included in the proposed action or alternatives.

§ 1502.15 Affected environment.

The environmental impact statement shall succinctly describe the environment of the area(s) to be affected or created by the alternatives under consideration. The description may be combined with evaluation of the environmental consequences (§ 1502.16) and shall be no longer than is necessary to understand the effects of the alternatives. Data and analyses in a statement shall be commensurate with the importance of the impact, with less important material summarized, consolidated, or simply referenced. Agencies shall avoid useless bulk in statements and shall concentrate effort and attention on important issues. Verbose descriptions of the affected environment are themselves no measure of the adequacy of an environmental impact statement.

§ 1502.16 Environmental consequences.

(a) This section forms the scientific and analytic basis for the comparisons under § 1502.14. It shall consolidate the discussions of those elements required by sections 102(2)(C)(i), (ii), (iv), and (v) of NEPA which are within the scope of the statement and as much of section 102(2)(C)(iii) of NEPA as is necessary to support the comparisons. This section should not duplicate discussions in § 1502.14. The discussion shall include:

(1) The environmental impacts of the proposed action and reasonable alternatives to the proposed action and their significance. The comparison of the proposed action and reasonable alternatives shall be based on this discussion of the impacts.

(2) Any adverse environmental effects which cannot be avoided should the proposal be implemented.

(3) The relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity.

(4) Any irreversible or irretrievable commitments of resources which would be involved in the proposal should it be implemented.

(5) Possible conflicts between the proposed action and the objectives of Federal, regional, State, Tribal, and local land use plans, policies and controls for the area concerned. (§ 1506.2(d))

(6) Energy requirements and conservation potential of various alternatives and mitigation measures.

(7) Natural or depletable resource requirements and conservation potential of various alternatives and mitigation measures.

(8) Urban quality, historic and cultural resources, and the design of the built environment, including the reuse and conservation potential of various alternatives and mitigation measures.

(9) Means to mitigate adverse environmental impacts (if not fully covered under § 1502.14(e)).

(10) Where applicable, economic and technical considerations, including the economic benefits of the proposed action.

(b) Economic or social effects by themselves do not require preparation of an environmental impact statement. However, when the agency determines that economic or social and natural or physical environmental effects are interrelated, then the environmental impact statement will discuss and give appropriate consideration to these effects on the human environment.

§ 1502.17 Summary of submitted alternatives, information, and analyses.

The environmental impact statement shall include a summary of all alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement. Consistent with § 1503.1(a)(3), the lead agency shall invite comment on the completeness of the summary in the draft environmental impact statement.

§ 1502.18 Certification of submitted alternatives, information, and analyses section.

Based on the summary of the submitted alternatives, information, and analyses section, the decision maker for the lead agency shall certify in the record of decision that the agency has considered all of the alternatives, information, and analyses submitted by public commenters for consideration by the lead and cooperating agencies in developing the environmental impact statement. Agency environmental impact statements certified in accordance with this section are entitled to a conclusive presumption that the agency has considered the information included in the submitted alternatives, information, and analyses section.

§ 1502.19 List of preparers.

The environmental impact statement shall list the names, together with their qualifications (expertise, experience, professional disciplines), of the persons who were primarily responsible for preparing the environmental impact statement or significant background papers, including basic components of the statement (§§ 1502.6 and 1502.8). Where possible the persons who are responsible for a particular analysis,

including analyses in background papers, shall be identified. Normally the list will not exceed two pages.

§ 1502.20 Appendix.

If an agency prepares an appendix, it shall be published with the environmental impact statement and shall consist of material:

(a) Prepared in connection with an environmental impact statement (as distinct from material which is not so prepared and which is incorporated by reference (§ 1501.12)).

(b) Substantiating any analysis fundamental to the impact statement.

(c) Relevant to the decision to be made.

§ 1502.21 Publication of the environmental impact statement.

Agencies shall publish the entire draft and final environmental impact statements and unchanged statements as provided in § 1503.4(c). The agency shall transmit the entire statement electronically (or in paper copy, if so requested due to economic or other hardship) to:

(a) Any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved and any appropriate Federal, State, Tribal, or local agency authorized to develop and enforce environmental standards.

(b) The applicant, if any.

(c) Any person, organization, or agency requesting the entire environmental impact statement.

(d) In the case of a final environmental impact statement any person, organization, or agency which submitted substantive comments on the draft.

§ 1502.22 Incomplete or unavailable information.

(a) When an agency is evaluating reasonably foreseeable significant adverse effects on the human environment in an environmental impact statement and there is incomplete or unavailable information, the agency shall make clear that such information is lacking.

(b) If the incomplete information relevant to reasonably foreseeable significant adverse impacts is essential to a reasoned choice among alternatives and the overall costs of obtaining it are not unreasonable, the agency shall include the information in the environmental impact statement.

(c) If the information relevant to reasonably foreseeable significant adverse impacts cannot be obtained because the overall costs of obtaining it are unreasonable or the means to obtain it are not known, the agency shall include within the environmental impact statement:

(1) A statement that such information is incomplete or unavailable;

(2) A statement of the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts on the human environment;

(3) A summary of existing credible scientific evidence which is relevant to evaluating the reasonably foreseeable significant adverse impacts on the human environment; and

(4) The agency's evaluation of such impacts based upon theoretical approaches or research methods generally accepted in the scientific community.

(d) For the purposes of this section, ''reasonably foreseeable'' includes impacts which have catastrophic consequences, even if their probability of occurrence is low, provided that the analysis of the impacts is supported by credible scientific evidence, is not based on pure conjecture, and is within the rule of reason.

§ 1502.23 Cost-benefit analysis.

If a cost-benefit analysis relevant to the choice among environmentally different alternatives is being considered for the proposed action, it shall be incorporated by reference or appended to the statement as an aid in evaluating the environmental consequences. To assess the adequacy of compliance with section 102(2)(B) of NEPA the statement shall, when a cost-benefit analysis is prepared, discuss the relationship between that analysis and any analyses of unquantified environmental impacts, values, and amenities. For purposes of complying with the Act, the weighing of the merits and drawbacks of the various alternatives need not be displayed in a monetary cost-benefit analysis and should not be when there are important qualitative considerations. In any event, an environmental impact statement should at least indicate those considerations, including factors not related to environmental quality, which are likely to be relevant and important to a decision.

§ 1502.24 Methodology and scientific accuracy.

Agencies shall ensure the professional integrity, including scientific integrity, of the discussions and analyses in environmental documents. Agencies shall make use of reliable existing data and resources and are not required to undertake new scientific and technical research to inform their analyses. Agencies may make use of any reliable data sources, such as remotely gathered information or statistical models. They shall identify any methodologies used and shall make explicit reference to the scientific and other sources relied upon for conclusions in the statement. An agency may place discussion of methodology in an appendix.

§ 1502.25 Environmental review and consultation requirements.

(a) To the fullest extent possible, agencies shall prepare draft environmental impact statements concurrent and integrated with environmental impact analyses and related surveys and studies required by all other Federal environmental review laws and Executive orders applicable to the proposed action, including the Fish and Wildlife Coordination Act (16 U.S.C. 661 *et seq.*), the National Historic Preservation Act of 1966 (16 U.S.C. 470 *et seq.*), and the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

(b) The draft environmental impact statement shall list all Federal permits, licenses, and other authorizations which must be obtained in implementing the proposal. If it is uncertain whether a Federal permit, license, or other authorization is necessary, the draft environmental impact statement shall so indicate.

■ 4. Revise part 1503 to read as follows:

PART 1503—COMMENTING ON ENVIRONMENTAL IMPACT STATEMENTS

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977.

§ 1503.1 Inviting comments and requesting information and analyses.

(a) After preparing a draft environmental impact statement and before preparing a final environmental impact statement the agency shall:

(1) Obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved or which is authorized to develop and enforce environmental standards.

(2) Request the comments of:

(i) Appropriate State, Tribal, and local agencies which are authorized to develop and enforce environmental standards;

(ii) State, Tribal, or local governments that may be affected by the proposed action;

(iii) Any agency which has requested that it receive statements on actions of the kind proposed;

(iv) The applicant, if any; and

(v) The public, affirmatively soliciting comments in a manner designed to inform those persons or organizations who may be interested in or affected by the proposed action.

(3) Invite comment specifically on the completeness of the submitted alternatives, information, and analyses section (§ 1502.17).

(b) An agency may request comments on a final environmental impact statement before the final decision. An agency shall request comments and provide a 30-day comment period on the final environmental impact statement's submitted alternatives, information, and analyses section (§ 1502.17). Other agencies or persons may make comments consistent with the time periods provided for under § 1506.11.

(c) An agency shall provide for electronic submission of public comments, with reasonable measures to ensure the comment process is accessible to affected persons.

§ 1503.2 Duty to comment.

Cooperating agencies and agencies that are authorized to develop and enforce environmental standards shall comment on statements within their jurisdiction, expertise, or authority within the time period specified for comment in § 1506.11. A Federal agency may reply that it has no comment. If a cooperating agency is satisfied that its views are adequately reflected in the environmental impact statement, it should reply that it has no comment.

§ 1503.3 Specificity of comments and information.

(a) To promote informed decision making, comments on an environmental impact statement or on a proposed action shall be as specific as possible, may address either the adequacy of the statement or the merits of the alternatives discussed or both, and shall provide as much detail as necessary to meaningfully participate and fully inform the agency of the commenter's position. Comments should explain why the issue raised is significant to the consideration of potential environmental impacts and alternatives to the proposed action, as well as economic and employment impacts, and other impacts affecting the quality of the human environment. Comments should reference the corresponding section or page number of the draft environmental impact statement, propose specific changes to those parts of the statement, where possible, and include or describe the data sources and methodologies supporting the proposed changes.

(b) Comments on the submitted alternatives, information, and analyses section (§ 1502.17) should identify any additional alternatives, information, or analyses not included in the draft environmental impact statement, and shall be as specific as possible. Comments on and objections to this section shall be raised within 30 days of the publication of the notice of availability of the final environmental impact statement. Comments not provided within 30 days shall be considered exhausted and forfeited, consistent with § 1500.3(b).

(c) When a participating agency criticizes a lead agency's predictive methodology, the participating agency should describe the alternative methodology which it prefers and why.

(d) A cooperating agency shall specify in its comments whether it needs additional information to fulfill other applicable environmental reviews or consultation requirements and what information it needs. In particular, it shall specify any additional information it needs to comment adequately on the draft statement's analysis of significant site-specific effects associated with the granting or approving by that cooperating agency of necessary Federal permits, licenses, or authorizations.

(e) When a cooperating agency with jurisdiction by law specifies mitigation measures it considers necessary to allow the agency to grant or approve applicable permit, license, or related requirements or concurrences, the cooperating agency shall cite to its applicable statutory authority.

§ 1503.4 Response to comments.

(a) An agency preparing a final environmental impact statement shall consider substantive comments timely submitted during the public comment period and may respond individually and collectively. In the final environmental impact statement, the agency may:

(1) Modify alternatives including the proposed action.

(2) Develop and evaluate alternatives not previously given serious consideration by the agency.

(3) Supplement, improve, or modify its analyses.

(4) Make factual corrections.

(5) Explain why the comments do not warrant further agency response.

(b) All substantive comments received on the draft statement (or summaries thereof where the response has been exceptionally voluminous), shall be appended to the final statement or otherwise published.

(c) If changes in response to comments are minor and are confined to the responses described in paragraphs (a)(4) and (5) of this section, agencies may write the changes on errata sheets and attach the responses to the statement instead of rewriting the draft statement. In such cases only the comments, the responses, and the changes and not the final statement need be published (§ 1502.20). The entire document with a new cover sheet shall be filed with the Environmental Protection Agency as the final statement (§ 1506.10).

■ 5. Revise part 1504 to read as follows:

PART 1504—PRE–DECISIONAL REFERRALS TO THE COUNCIL OF PROPOSED FEDERAL ACTIONS DETERMINED TO BE ENVIRONMENTALLY UNSATISFACTORY

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; and E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977.

§ 1504.1 Purpose.

(a) This part establishes procedures for referring to the Council Federal interagency disagreements concerning proposed major Federal actions that might cause unsatisfactory environmental effects. It provides means for early resolution of such disagreements.

(b) Under section 309 of the Clean Air Act (42 U.S.C. 7609), the Administrator of the Environmental Protection Agency is directed to review and comment publicly on the environmental impacts of Federal activities, including actions for which environmental impact statements are prepared. If after this review the Administrator determines that the matter is ''unsatisfactory from the standpoint of public health or welfare or environmental quality,'' section 309 directs that the matter be referred to the Council (hereafter ''environmental referrals'').

(c) Under section 102(2)(C) of NEPA (42 U.S.C. 4332(2)(C)), other Federal agencies may produce similar reviews of environmental impact statements, including judgments on the acceptability of anticipated environmental impacts. These reviews must be made available to the President, the Council and the public.

§ 1504.2 Criteria for referral.

Environmental referrals should be made to the Council only after concerted, timely (as early as practicable in the process), but unsuccessful attempts to resolve differences with the lead agency. In determining what environmental objections to the matter are appropriate to refer to the Council, an agency should weigh potential adverse environmental impacts, considering:

(a) Possible violation of national environmental standards or policies.

(b) Severity.

(c) Geographical scope.

(d) Duration.

(e) Importance as precedents.

(f) Availability of environmentally preferable alternatives.

(g) Economic and technical considerations, including the economic costs of delaying or impeding the decision making of the agencies involved in the action.

§ 1504.3 Procedure for referrals and response.

(a) A Federal agency making the referral to the Council shall:

(1) Advise the lead agency at the earliest possible time that it intends to refer a matter to the Council unless a satisfactory agreement is reached.

(2) Include such advice whenever practicable in the referring agency's comments on the environmental assessment or draft environmental impact statement.

(3) Identify any essential information that is lacking and request that the lead agency make it available at the earliest possible time.

(4) Send copies of such advice to the Council.

(b) The referring agency shall deliver its referral to the Council no later than 25 days after the lead agency has made the final environmental impact statement available to the Environmental Protection Agency, participating agencies, and the public, and in the case of an environmental assessment, no later than 25 days after the lead agency makes it available. Except when the lead agency grants an extension of this period, the Council will not accept a referral after that date.

(c) The referral shall consist of:

(1) A copy of the letter signed by the head of the referring agency and delivered to the lead agency informing the lead agency of the referral and the reasons for it.

(2) A statement supported by factual evidence leading to the conclusion that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality. The statement shall:

(i) Identify any disputed material facts and incorporate (by reference if appropriate) agreed upon facts;

(ii) Identify any existing environmental requirements or policies which would be violated by the matter;

(iii) Present the reasons for the referral;

(ii) Contain a finding by the agency whether the issue raised is of national importance because of the threat to national environmental resources or policies or for some other reason;

(iii) Review the steps taken by the referring agency to bring its concerns to the attention of the lead agency at the earliest possible time; and

(iv) Give the referring agency's recommendations as to what mitigation alternative, further study, or other course of action (including abandonment of the matter) are necessary to remedy the situation.

(d) No later than 25 days after the referral to the Council, the lead agency may deliver a response to the Council and the referring agency. If the lead agency requests more time and gives assurance that the matter will not go forward in the interim, the Council may grant an extension. The response shall:

(1) Address fully the issues raised in the referral.

(2) Be supported by evidence and explanations, as appropriate.

(3) Give the lead agency's response to the referring agency's recommendations.

(e) Applicants may provide views in writing to the Council no later than the response.

(f) No later than 25 days after receipt of both the referral and any response or upon being informed that there will be no response (unless the lead agency agrees to a longer time), the Council may take one or more of the following actions:

(1) Conclude that the process of referral and response has successfully resolved the problem.

(2) Initiate discussions with the agencies with the objective of mediation with referring and lead agencies.

(3) Obtain additional views and information.

(4) Determine that the issue is not one of national importance and request the referring and lead agencies to pursue their decision process.

(5) Determine that the issue should be further negotiated by the referring and lead agencies and is not appropriate for Council consideration until one or more heads of agencies report to the Council that the agencies' disagreements are irreconcilable.

(6) Publish its findings and recommendations (including where appropriate a finding that the submitted evidence does not support the position of an agency).

(7) When appropriate, submit the referral and the response together with the Council's recommendation to the President for action.

(g) The Council shall take no longer than 60 days to complete the actions specified in paragraph (f)(2), (3), or (5) of this section.

(h) The referral process is not intended to create any private rights of action or to be judicially reviewable because any voluntary resolutions by the agency parties do not represent final agency action and instead are only provisional and dependent on later consistent action by the action agencies.

■ 6. Revise part 1505 to read as follows:

PART 1505—NEPA AND AGENCY DECISION MAKING

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1505.1 [Reserved]

§ 1505.2 Record of decision in cases requiring environmental impact statements.

At the time of its decision (§ 1506.11) or, if appropriate, its recommendation to Congress, each agency shall prepare and timely publish a concise public record of decision or joint record of decision. The record, which each agency may integrate into any other record it prepares, shall:

(a) State the decision.

(b) Identify all alternatives considered by the agency in reaching its decision, specifying the alternative or alternatives which were considered to be environmentally preferable. An agency may discuss preferences among alternatives based on relevant factors including economic and technical considerations and agency statutory missions. An agency shall identify and discuss all such factors, including any essential considerations of national policy which were balanced by the agency in making its decision and state how those considerations entered into its decision.

(c) State whether the agency has adopted all practicable means to avoid or minimize environmental harm from the alternative selected, and if not, why the agency did not. The agency shall adopt and summarize, where applicable, a monitoring and enforcement program

for any enforceable mitigation requirements or commitments.

(d) Address any comments or objections received on the final environmental impact statement's submitted alternatives, information, and analyses section.

(e) Include the decision maker's certification regarding the agency's consideration of the submitted alternatives, information, and analyses submitted by public commenters (§§ 1502.17 and 1502.18).

§ 1505.3 Implementing the decision.

Agencies may provide for monitoring to assure that their decisions are carried out and should do so in important cases. Mitigation (§ 1505.2(c)) and other conditions established in the environmental impact statement or during its review and committed as part of the decision shall be implemented by the lead agency or other appropriate consenting agency. The lead agency shall:

(a) Include appropriate conditions in grants, permits or other approvals.

(b) Condition funding of actions on mitigation.

(c) Upon request, inform cooperating or participating agencies on progress in carrying out mitigation measures which they have proposed and which were adopted by the agency making the decision.

(d) Upon request, publish the results of relevant monitoring.

■ 7. Revise part 1506 to read as follows:

PART 1506—OTHER REQUIREMENTS OF NEPA

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1506.1 Limitations on actions during NEPA process.

(a) Except as provided in paragraphs (b) and (c) of this section, until an agency issues a finding of no significant impact, as provided in § 1501.6, or record of decision, as provided in § 1505.2, no action concerning the proposal may be taken which would:

(1) Have an adverse environmental impact; or

(2) Limit the choice of reasonable alternatives.

(b) If any agency is considering an application from a non-Federal entity, and is aware that the applicant is about to take an action within the agency's jurisdiction that would meet either of the criteria in paragraph (a) of this section, then the agency shall promptly notify the applicant that the agency will take appropriate action to ensure that the objectives and procedures of NEPA are achieved. This section does not preclude development by applicants of plans or designs or performance of other activities necessary to support an application for Federal, State, Tribal, or local permits or assistance. An agency considering a proposed action for Federal funding may authorize such activities, including, but not limited to, acquisition of interests in land (*e.g.,* fee simple, rights-of-way, and conservation easements), purchase of long lead-time equipment, and purchase options made by applicants.

(c) While work on a required programmatic environmental impact statement or environmental assessment is in progress and the action is not covered by an existing programmatic statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

(1) Is justified independently of the program;

(2) Is itself accompanied by an adequate environmental impact statement; and

(3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.

§ 1506.2 Elimination of duplication with State, Tribal, and local procedures.

(a) Federal agencies are authorized to cooperate with State, Tribal, and local agencies that are responsible for preparing environmental documents, including those prepared pursuant to section 102(2)(D) of NEPA.

(b) Agencies shall cooperate with State, Tribal, and local agencies to the fullest extent practicable to reduce duplication between NEPA and State, Tribal, and local requirements, including through use of environmental studies, analysis, and decisions conducted in support of Federal, State, Tribal, or local environmental reviews or authorization decisions, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall to the fullest extent practicable include:

(1) Joint planning processes.

(2) Joint environmental research and studies.

(3) Joint public hearings (except where otherwise provided by statute).

(4) Joint environmental assessments.

(c) Agencies shall cooperate with State, Tribal, and local agencies to the fullest extent practicable to reduce duplication between NEPA and comparable State, Tribal, and local requirements, unless the agencies are specifically barred from doing so by some other law. Except for cases covered by paragraph (a) of this section, such cooperation shall include, to the fullest extent practicable, joint environmental impact statements. In such cases one or more Federal agencies and one or more State, Tribal, or local agencies shall be joint lead agencies. Where State or Tribal laws or local ordinances have environmental impact statement or similar requirements in addition to but not in conflict with those in NEPA, Federal agencies may cooperate in fulfilling these requirements, as well as those of Federal laws, so that one document will comply with all applicable laws.

(d) To better integrate environmental impact statements into State, Tribal, or local planning processes, environmental impact statements shall discuss any inconsistency of a proposed action with any approved State, Tribal, or local plan or law (whether or not federally sanctioned). Where an inconsistency exists, the statement should describe the extent to which the agency would reconcile its proposed action with the plan or law. While the statement should discuss any inconsistencies, NEPA does not require reconciliation.

§ 1506.3 Adoption.

(a) An agency may adopt a Federal environmental assessment, draft or final environmental impact statement, or portion thereof, provided that the assessment, statement, or portion thereof meets the standards for an adequate assessment or statement under the regulations in parts 1500 through 1508.

(b) If the actions covered by the original environmental impact statement and the proposed action are substantially the same, the agency adopting another agency's statement shall republish it as a final statement.

Otherwise, the adopting agency shall treat the statement as a draft and republish it (except as provided in paragraph (c) of this section), consistent with § 1506.10.

(c) A cooperating agency may adopt in its record of decision without republishing the environmental impact statement of a lead agency when, after an independent review of the statement, the cooperating agency concludes that its comments and suggestions have been satisfied.

(d) If the actions covered by the original environmental assessment and the proposed action are substantially the same, an agency may adopt another agency's environmental assessment in its finding of no significant impact and provide notice consistent with § 1501.6.

(e) The adopting agency shall specify if one of the following circumstances are present:

(1) The agency is adopting an assessment or statement that is not final within the agency that prepared it.

(2) The action assessed in the assessment or statement is the subject of a referral under part 1504.

(3) The assessment or statement's adequacy is the subject of a judicial action that is not final.

(f) An agency may adopt another agency's determination that a categorical exclusion applies to a proposed action if the adopting agency's proposed action is substantially the same.

§ 1506.4 Combining documents.

Agencies should combine, to the fullest extent practicable, any environmental document with any other agency document to reduce duplication and paperwork.

§ 1506.5 Agency responsibility for environmental documents.

(a) *Information.* If an agency requires an applicant to submit environmental information for possible use by the agency in preparing an environmental document, then the agency should assist the applicant by outlining the types of information required. The agency shall independently evaluate the information submitted and shall be responsible for its accuracy. If the agency chooses to use the information submitted by the applicant in the environmental document, either directly or by reference, then the names of the persons responsible for the independent evaluation shall be included in the list of preparers (§ 1502.19). It is the intent of this paragraph that acceptable work not be redone, but that it be verified by the agency.

(b) *Environmental assessments.* If an agency permits an applicant to prepare an environmental assessment, the agency, besides fulfilling the requirements of paragraph (a) of this section, shall make its own evaluation of the environmental issues and take responsibility for the scope and content of the environmental assessment.

(c) *Environmental impact statements.* Except as provided in §§ 1506.2 and 1506.3, the lead agency, a contractor or applicant under the direction of the lead agency, or a cooperating agency, where appropriate (§ 1501.8(b)), may prepare an environmental impact statement pursuant to the requirements of NEPA.

(1) If a contractor or applicant prepares the document, the responsible Federal official shall provide guidance, participate in its preparation, independently evaluate it prior to its approval, and take responsibility for its scope and contents.

(2) Nothing in this section is intended to prohibit any agency from requesting any person, including the applicant, to submit information to it or to prohibit any person from submitting information to any agency for use in preparing environmental documents.

§ 1506.6 Public involvement.

Agencies shall:

(a) Make diligent efforts to involve the public in preparing and implementing their NEPA procedures (§ 1507.3).

(b) Provide public notice of NEPA-related hearings, public meetings, and other opportunities for public engagement, and the availability of environmental documents so as to inform those persons and agencies who may be interested or affected by their proposed actions.

(1) In all cases, the agency shall notify those who have requested notice on an individual action.

(2) In the case of an action with effects of national concern, notice shall include publication in the **Federal Register**. An agency may notify organizations that have requested regular notice. Agencies shall maintain a list of such organizations.

(3) In the case of an action with effects primarily of local concern, the notice may include:

(i) Notice to State and local agencies that may be interested or affected by the proposed action.

(ii) Notice to affected Tribal governments.

(iii) Following the affected State or Tribe's public notice procedures for comparable actions.

(iv) Publication in local newspapers (in papers of general circulation rather than legal papers).

(v) Notice through other local media.

(vi) Notice to potentially interested community organizations including small business associations.

(vii) Publication in newsletters that may be expected to reach potentially interested persons.

(viii) Direct mailing to owners and occupants of nearby or affected property.

(ix) Posting of notice on and off site in the area where the action is to be located.

(x) Notice through electronic media (*e.g.,* a project or agency website, email, or social media). For actions occurring in whole or part in an area with limited access to high-speed internet, public notification may not be limited to solely electronic methods.

(c) Hold or sponsor public hearings, public meetings, or other opportunities for public engagement whenever appropriate or in accordance with statutory requirements applicable to the agency. Agencies may conduct public hearings and public meetings by means of electronic communication except where another format is required by law.

(d) Solicit appropriate information from the public.

(e) Explain in its procedures where interested persons can get information or status reports on environmental impact statements and other elements of the NEPA process.

(f) Make environmental impact statements, the comments received, and any underlying documents available to the public pursuant to the provisions of the Freedom of Information Act, as amended (5 U.S.C. 552).

§ 1506.7 Further guidance.

The Council may provide further guidance concerning NEPA and its procedures consistent with Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects (August 5, 2017), Executive Order 13891, Promoting the Rule of Law Through Improved Agency Guidance Documents (October 9, 2019), and any other applicable Executive orders.

§ 1506.8 Proposals for legislation.

(a) When developing or providing significant cooperation and support in the development of legislation, agencies shall integrate the NEPA process for proposals for legislation significantly affecting the quality of the human environment with the legislative process of the Congress. The test for significant cooperation is whether the proposal is in fact predominantly that of the agency rather than another source. Drafting

does not by itself constitute significant cooperation. Only the agency which has primary responsibility for the subject matter involved will prepare a legislative environmental impact statement.

(b) A legislative environmental impact statement is the detailed statement required by law to be included in a recommendation or report on a legislative proposal to Congress. A legislative environmental impact statement shall be considered part of the formal transmittal of a legislative proposal to Congress; however, it may be transmitted to Congress up to 30 days later in order to allow time for completion of an accurate statement that can serve as the basis for public and Congressional debate. The statement must be available in time for Congressional hearings and deliberations.

(c) Preparation of a legislative environmental impact statement shall conform to the requirements of the regulations in parts 1500 through 1508, except as follows:

(1) There need not be a scoping process.

(2) Agencies shall prepare the legislative statement in the same manner as a draft environmental impact statement and need not prepare a final statement unless any of the following conditions exist. In such cases, the agency shall prepare and publish the statements consistent with §§ 1503.1 and 1506.11:

(i) A Congressional committee with jurisdiction over the proposal has a rule requiring both draft and final environmental impact statements.

(ii) The proposal results from a study process required by statute (such as those required by the Wild and Scenic Rivers Act (16 U.S.C. 1271 *et seq.*) and the Wilderness Act (16 U.S.C. 1131 *et seq.*)).

(iii) Legislative approval is sought for Federal or federally assisted construction or other projects which the agency recommends be located at specific geographic locations. For proposals requiring an environmental impact statement for the acquisition of space by the General Services Administration, a draft statement shall accompany the Prospectus or the 11(b) Report of Building Project Surveys to the Congress, and a final statement shall be completed before site acquisition.

(iv) The agency decides to prepare draft and final statements.

(d) Comments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction.

§ 1506.9 Proposals for regulations.

(a) Where the proposal for major Federal action is the promulgation of a rule or regulation, analyses prepared pursuant to other statutory or Executive order requirements may serve as the functional equivalent of the EIS and be sufficient to comply with NEPA.

(b) To determine that an analysis serves as the functional equivalent of an EIS, an agency shall find that:

(1) There are substantive and procedural standards that ensure full and adequate consideration of environmental issues;

(2) There is public participation before a final alternative is selected; and

(3) A purpose of the analysis that the agency is conducting is to examine environmental issues.

§ 1506.10 Filing requirements.

(a) Environmental impact statements together with comments and responses shall be filed with the Environmental Protection Agency, Office of Federal Activities, consistent with EPA's procedures.

(b) Statements shall be filed with the EPA no earlier than they are also transmitted to participating agencies and made available to the public. EPA may issue guidelines to agencies to implement its responsibilities under this section and § 1506.11.

§ 1506.11 Timing of agency action.

(a) The Environmental Protection Agency shall publish a notice in the **Federal Register** each week of the environmental impact statements filed since its prior notice. The minimum time periods set forth in this section shall be calculated from the date of publication of this notice.

(b) Unless otherwise provided by law, including statutory provisions for combining a final environmental impact statement and record of decision, Federal agencies may not make or issue a record of decision under § 1505.2 for the proposed action until the later of the following dates:

(1) 90 days after publication of the notice described above in paragraph (a) of this section for a draft environmental impact statement.

(2) 30 days after publication of the notice described above in paragraph (a) of this section for a final environmental impact statement.

(c) An agency may make an exception to the rule on timing set forth in paragraph (b) of this section for a proposed action in the following circumstances.

(1) Some agencies have a formally established appeal process which allows other agencies or the public to take appeals on a decision and make their views known, after publication of the final environmental impact statement. In such cases, where a real opportunity exists to alter the decision, the decision may be made and recorded at the same time the environmental impact statement is published. This means that the period for appeal of the decision and the 30-day period set forth in paragraph (b)(2) of this section may run concurrently. In such cases, the environmental impact statement shall explain the timing and the public's right of appeal and provide notification consistent with § 1506.10.

(2) An agency engaged in rulemaking under the Administrative Procedure Act or other statute for the purpose of protecting the public health or safety may waive the time period in paragraph (b)(2) of this section, publish a decision on the final rule simultaneously with publication of the notice of the availability of the final environmental impact statement and provide notification consistent with § 1506.10, as described in paragraph (a) of this section.

(d) If an agency files the final environmental impact statement within 90 days of the filing of the draft environmental impact statement with the Environmental Protection Agency, the decision-making period and the 90-day period may run concurrently. However, subject to paragraph (e) of this section, agencies shall allow at least 45 days for comments on draft statements.

(e) The lead agency may extend the minimum periods in paragraph (b) of this section and provide notification consistent with § 1506.10. The Environmental Protection Agency may upon a showing by the lead agency of compelling reasons of national policy reduce the minimum periods and may upon a showing by any other Federal agency of compelling reasons of national policy also extend the minimum periods, but only after consultation with the lead agency. The lead agency may modify the minimum periods when necessary to comply with other specific statutory requirements. (§ 1507.3(e)(2)) Failure to file timely comments shall not be a sufficient reason for extending a period. If the lead agency does not concur with the extension of time, EPA may not extend it for more than 30 days. When the Environmental Protection Agency reduces or extends any period of time it shall notify the Council.

§ 1506.12 Emergencies.

Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of the regulations in parts 1500 through 1508, the Federal agency taking the action should consult with the Council about alternative arrangements for compliance with section 102(2)(C) of NEPA. Agencies and the Council will limit such arrangements to actions necessary to control the immediate impacts of the emergency. Other actions remain subject to NEPA review.

§ 1506.13 Effective date.

The regulations in parts 1500 through 1508 apply to any NEPA process begun after [EFFECTIVE DATE OF FINAL RULE]. An agency may apply these regulations to ongoing activities and environmental documents begun before [EFFECTIVE DATE OF FINAL RULE].

■ 8. Revise part 1507 to read as follows:

PART 1507—AGENCY COMPLIANCE

Sec.

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1507.1 Compliance.

All agencies of the Federal Government shall comply with the regulations in parts 1500 through 1508.

§ 1507.2 Agency capability to comply.

Each agency shall be capable (in terms of personnel and other resources) of complying with the requirements of NEPA and the regulations in parts 1500 through 1508. Such compliance may include use of the resources of other agencies, applicants, and other participants in the NEPA process, but the using agency shall itself have sufficient capability to evaluate what others do for it and account for the contributions of others. Agencies shall:

(a) Fulfill the requirements of section 102(2)(A) of NEPA to utilize a systematic, interdisciplinary approach which will ensure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on the human environment. Agencies shall designate a senior agency official to be responsible for overall review of agency NEPA compliance.

(b) Identify methods and procedures required by section 102(2)(B) of NEPA to ensure that presently unquantified environmental amenities and values may be given appropriate consideration.

(c) Prepare adequate environmental impact statements pursuant to section 102(2)(C) of NEPA and cooperate on the development of statements in the areas where the agency has jurisdiction by law or special expertise or is authorized to develop and enforce environmental standards.

(d) Study, develop, and describe alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources. This requirement of section 102(2)(E) of NEPA extends to all such proposals, not just the more limited scope of section 102(2)(C)(iii) of NEPA where the discussion of alternatives is confined to impact statements.

(e) Comply with the requirements of section 102(2)(H) of NEPA that the agency initiate and utilize ecological information in the planning and development of resource-oriented projects.

(f) Fulfill the requirements of sections 102(2)(F), 102(2)(G), and 102(2)(I), of NEPA, Executive Order 11514, Protection and Enhancement of Environmental Quality, section 2, as amended by Executive Order 11991, Relating to Protection and Enhancement of Environmental Quality, and Executive Order 13807, Establishing Discipline and Accountability in the Environmental Review and Permitting for Infrastructure Projects.

§ 1507.3 Agency NEPA procedures.

(a) No more than 12 months after [PUBLICATION DATE OF FINAL RULE] in the **Federal Register**, or 9 months after the establishment of an agency, whichever comes later, each agency shall develop or revise, as necessary, proposed procedures to implement the regulations in parts 1500 through 1508, including to eliminate any inconsistencies with these regulations. When the agency is a department, major subunits are encouraged (with the consent of the department) to adopt their own procedures. Except as otherwise provided by law or for agency efficiency, agency NEPA procedures shall not impose additional procedures or requirements beyond those set forth in these regulations.

(1) Each agency shall consult with the Council while developing or revising its proposed procedures and before publishing them in the **Federal Register** for comment. Agencies with similar programs should consult with each other and the Council to coordinate their procedures, especially for programs requesting similar information from applicants.

(2) Agencies shall provide an opportunity for public review and review by the Council for conformity with the Act and the regulations in parts 1500 through 1508 before adopting their final procedures. The Council shall complete its review within 30 days of the receipt of the proposed final procedures. Once in effect, the agency shall publish its NEPA procedures and ensure that they are readily available to the public.

(b) Agencies shall adopt, as necessary, agency NEPA procedures to improve agency efficiency and ensure that decisions are made in accordance with the Act's procedural requirements. Such procedures shall include, but not be limited to:

(1) Implementing procedures under section 102(2) of NEPA to achieve the requirements of sections 101 and 102(1).

(2) Designating the major decision points for the agency's principal programs likely to have a significant effect on the human environment and assuring that the NEPA process corresponds with them.

(3) Requiring that relevant environmental documents, comments, and responses be part of the record in formal rulemaking or adjudicatory proceedings.

(4) Requiring that relevant environmental documents, comments, and responses accompany the proposal through existing agency review processes so that decision makers use the statement in making decisions.

(5) Requiring that the alternatives considered by the decision maker are encompassed by the range of alternatives discussed in the relevant environmental documents and that the decision maker consider the alternatives described in the environmental impact statement. If another decision document accompanies the relevant environmental documents to the decision maker, agencies are encouraged to make available to the public before the decision is made any part of that document that relates to the comparison of alternatives.

(6) Requiring the combination of environmental documents with other agency documents, and may include designation of analyses or processes that shall serve the function of agency compliance with NEPA and the regulations in parts 1500 through 1508. To determine that an analysis individually or analyses in the aggregate serve as the functional equivalent of an EIS, an agency shall find that:

(i) There are substantive and procedural standards that ensure full and adequate consideration of environmental issues;

(ii) There is public participation before a final alternative is selected; and

(iii) A purpose of the analysis that the agency is conducting is to examine environmental issues.

(c) Agency procedures may include identification of actions that are not subject to NEPA, including:

(1) Non-major Federal actions;

(2) Actions that are non-discretionary actions, in whole or in part;

(3) Actions expressly exempt from NEPA under another statute;

(4) Actions for which compliance with NEPA would clearly and fundamentally conflict with the requirements of another statute; and

(5) Actions for which compliance with NEPA would be inconsistent with Congressional intent due to the requirements of another statute.

(d) Agency procedures shall comply with the regulations in parts 1500 through 1508 except where compliance would be inconsistent with statutory requirements and shall include:

(1) Those procedures required by §§ 1501.2(b)(4) (assistance to applicants), and 1506.6(e) (status information).

(2) Specific criteria for and identification of those typical classes of action:

(i) Which normally do require environmental impact statements.

(ii) Which normally do not require either an environmental impact statement or an environmental assessment and do not have a significant effect on the human environment (categorical exclusions (§ 1501.4)). Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect. Agency NEPA procedures shall identify where documentation of a categorical exclusion determination is required.

(iii) Which normally require environmental assessments but not necessarily environmental impact statements.

(3) Procedures for introducing a supplement to an environmental assessment or environmental impact statement into its formal administrative record, if such a record exists.

(e) Agency procedures may:

(1) Include specific criteria for providing limited exceptions to the provisions of the regulations in parts 1500 through 1508 for classified proposals. These are proposed actions that are specifically authorized under criteria established by an Executive Order or statute to be kept secret in the interest of national defense or foreign policy and are in fact properly classified pursuant to such Executive Order or statute. Agencies may safeguard and restrict from public dissemination environmental assessments and environmental impact statements that address classified proposals in accordance with agencies' own regulations applicable to classified information. Agencies should organize these documents so that classified portions are included as annexes, so that the agencies can make the unclassified portions available to the public.

(2) Provide for periods of time other than those presented in § 1506.11 when necessary to comply with other specific statutory requirements.

(3) Provide that where there is a lengthy period between the agency's decision to prepare an environmental impact statement and the time of actual preparation, the agency may publish the notice of intent required by § 1501.9 at a reasonable time in advance of preparation of the draft statement. Agency procedures shall provide for publication of supplemental notices to inform the public of a pause in its preparation of an environmental impact statement and for any agency decision to withdraw its notice of intent to prepare an environmental impact statement.

(4) Adopt procedures to combine its environmental assessment process with its scoping process.

(5) Provide for a process where the agency may consult with and apply a categorical exclusion listed in another agency's NEPA procedures to its proposed action by establishing a process that ensures application of the categorical exclusion is appropriate.

§ 1507.4 Agency NEPA program information.

(a) To allow agencies and the public to efficiently and effectively access information about NEPA reviews, agencies shall provide for agency websites or other means to make available environmental documents, relevant notices, and other relevant information for use by agencies, applicants, and interested persons. Such means of publication may include:

(1) Agency planning and environmental documents that guide agency management and provide for public involvement in agency planning processes;

(2) A directory of pending and final environmental documents;

(3) Agency policy documents, orders, terminology, and explanatory materials regarding agency decision-making processes;

(4) Agency planning program information, plans, and planning tools; and

(5) A database searchable by geographic information, document status, document type, and project type.

(b) Agencies shall provide for efficient and effective interagency coordination of their environmental program websites, including use of shared databases or application programming interface, in their implementation of NEPA and related authorities.

■ 9. Revise part 1508 to read as follows:

PART 1508—DEFINITIONS

Authority: 42 U.S.C. 4321–4347; 42 U.S.C. 4371–4375; 42 U.S.C. 7609; E.O. 11514, 35 FR 4247, Mar. 7, 1970, as amended by E.O. 11991, 42 FR 26967, May 25, 1977; and E.O. 13807, 82 FR 40463, Aug. 24, 2017.

§ 1508.1 Definitions.

The following definitions apply to the regulations in parts 1500 through 1508. Federal agencies shall use these terms uniformly throughout the Federal Government.

(a) *Act* or *NEPA* means the National Environmental Policy Act, as amended (42 U.S.C. 4321, *et seq.*).

(b) *Affecting* means will or may have an effect on.

(c) *Authorization* means any license, permit, approval, finding, determination, or other administrative decision issued by an agency that is required or authorized under Federal law in order to implement a proposed action.

(d) *Categorical exclusion* means a category of actions which the agency has determined in its agency NEPA procedures (§ 1507.3) normally do not have a significant effect on the human environment.

(e) *Cooperating agency* means any Federal agency (and a State, Tribal, or local agency with agreement of the lead agency) other than a lead agency which has jurisdiction by law or special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative) for legislation or other major Federal action significantly affecting the quality of the human environment.

(f) *Council* means the Council on Environmental Quality established by title II of the Act.

(g) *Effects* or *impacts* means effects of the proposed action or alternatives that are reasonably foreseeable and have a reasonably close causal relationship to

the proposed action or alternatives. Effects include reasonably foreseeable effects that occur at the same time and place and may include reasonably foreseeable effects that are later in time or farther removed in distance.

(1) Effects include ecological (such as the effects on natural resources and on the components, structures, and functioning of affected ecosystems), aesthetic, historic, cultural, economic (such as the effects on employment), social, or health effects. Effects may also include those resulting from actions that may have both beneficial and detrimental effects, even if on balance the agency believes that the effect will be beneficial.

(2) A ''but for'' causal relationship is insufficient to make an agency responsible for a particular effect under NEPA. Effects should not be considered significant if they are remote in time, geographically remote, or the product of a lengthy causal chain. Effects do not include effects that the agency has no ability to prevent due to its limited statutory authority or would occur regardless of the proposed action. Analysis of cumulative effects is not required.

(h) *Environmental assessment* means a concise public document prepared by a Federal agency to aid an agency's compliance with the Act and support its determination of whether to prepare an environmental impact statement or finding of no significant impact, as provided in § 1501.6.

(i) *Environmental document* means an environmental assessment, environmental impact statement, finding of no significant impact, or notice of intent.

(j) *Environmental impact statement* means a detailed written statement as required by section 102(2)(C) of NEPA.

(k) *Federal agency* means all agencies of the Federal Government. It does not mean the Congress, the Judiciary, or the President, including the performance of staff functions for the President in his Executive Office. It also includes, for purposes of the regulations in parts 1500 through 1508, States, units of general local government, and Tribal governments assuming NEPA responsibilities from a Federal agency pursuant to statute.

(l) *Finding of no significant impact* means a document by a Federal agency briefly presenting the reasons why an action, not otherwise categorically excluded (§ 1501.4), will not have a significant effect on the human environment and for which an environmental impact statement therefore will not be prepared.

(m) *Human environment* means comprehensively the natural and physical environment and the relationship of present and future generations of Americans with that environment. (See the definition of ''effects.'')

(n) *Jurisdiction by law* means agency authority to approve, veto, or finance all or part of the proposal.

(o) *Lead agency* means the agency or agencies, in the case of joint lead agencies, preparing or having taken primary responsibility for preparing the environmental impact statement.

(p) *Legislation* means a bill or legislative proposal to Congress developed by or with the significant cooperation and support of a Federal agency, but does not include requests for appropriations or legislation recommended by the President.

(q) *Major Federal action* or *action* means an action subject to Federal control and responsibility with effects that may be significant. Major Federal action does not include non-discretionary decisions made in accordance with the agency's statutory authority or activities that do not result in final agency action under the Administrative Procedure Act. Major Federal action also does not include non-Federal projects with minimal Federal funding or minimal Federal involvement where the agency cannot control the outcome of the project.

(1) Major Federal actions may include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by Federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (§ 1506.8). Actions do not include funding assistance solely in the form of general revenue sharing funds with no Federal agency control over the subsequent use of such funds. Actions do not include loans, loan guarantees, or other forms of financial assistance where the Federal agency does not exercise sufficient control and responsibility over the effects of the action. Actions do not include farm ownership and operating loan guarantees by the Farm Service Agency pursuant to 7 U.S.C. 1925 and 1941 through 1949 and business loan guarantees by the Small Business Administration pursuant to 15 U.S.C. 636(a), 636(m), and 695 through 697f. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.

(2) Major Federal actions tend to fall within one of the following categories:

(i) Adoption of official policy, such as rules, regulations, and interpretations adopted pursuant to the Administrative Procedure Act, 5 U.S.C. 551 *et seq.;* implementation of treaties and international conventions or agreements; formal documents establishing an agency's policies which will result in or substantially alter agency programs.

(ii) Adoption of formal plans, such as official documents prepared or approved by Federal agencies which prescribe alternative uses of Federal resources, upon which future agency actions will be based.

(iii) Adoption of programs, such as a group of concerted actions to implement a specific policy or plan; systematic and connected agency decisions allocating agency resources to implement a specific statutory program or executive directive.

(iv) Approval of specific projects, such as construction or management activities located in a defined geographic area. Projects include actions approved by permit or other regulatory decision as well as Federal and federally assisted activities.

(r) *Matter* includes for purposes of part 1504:

(1) With respect to the Environmental Protection Agency, any proposed legislation, project, action or regulation as those terms are used in section 309(a) of the Clean Air Act (42 U.S.C. 7609).

(2) With respect to all other agencies, any proposed major Federal action to which section 102(2)(C) of NEPA applies.

(s) *Mitigation* means measures that avoid, minimize, or compensate for reasonably foreseeable impacts to the human environment caused by a proposed action as described in an environmental document or record of decision and that have a nexus to the effects of a proposed action. While NEPA requires consideration of mitigation, it does not mandate the form or adoption of any mitigation. Mitigation includes:

(1) Avoiding the impact altogether by not taking a certain action or parts of an action.

(2) Minimizing impacts by limiting the degree or magnitude of the action and its implementation.

(3) Rectifying the impact by repairing, rehabilitating, or restoring the affected environment.

(4) Reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action.

(5) Compensating for the impact by replacing or providing substitute resources or environments.

(t) *NEPA process* means all measures necessary for compliance with the

requirements of section 2 and title I of NEPA.

(u) *Notice of intent* means a public notice that an agency will prepare and consider an environmental impact statement.

(v) *Page* means 500 words and does not include explanatory maps, diagrams, graphs, tables, and other means of graphically displaying quantitative or geospatial information.

(w) *Participating agency* means a Federal, State, Tribal, or local agency participating in an environmental review or authorization of an action.

(x) *Proposal* means a proposed action at a stage when an agency has a goal, is actively preparing to make a decision on one or more alternative means of accomplishing that goal, and can meaningfully evaluate its effects. A proposal may exist in fact as well as by agency declaration that one exists.

(y) *Publish* and *publication* mean methods found by the agency to efficiently and effectively make environmental documents and information available for review by interested persons, including electronic publication, and adopted by agency NEPA procedures pursuant to § 1507.3.

(z) *Reasonable alternatives* means a reasonable range of alternatives that are technically and economically feasible, meet the purpose and need for the proposed action, and, where applicable, meet the goals of the applicant.

(aa) *Reasonably foreseeable* means sufficiently likely to occur such that a person of ordinary prudence would take it into account in reaching a decision.

(bb) *Referring agency* means the Federal agency that has referred any matter to the Council after a determination that the matter is unsatisfactory from the standpoint of public health or welfare or environmental quality.

(cc) *Scope* consists of the range of actions, alternatives, and impacts to be considered in an environmental impact statement. The scope of an individual statement may depend on its relationships to other statements (§ 1501.11).

(dd) *Senior agency official* means an official of assistant secretary rank or higher, or equivalent, that is designated for agency NEPA compliance, including resolving implementation issues and representing the agency analysis of the effects of agency actions on the human environment in agency decision-making processes.

(ee) *Special expertise* means statutory responsibility, agency mission, or related program experience.

(ff) *Tiering* refers to the coverage of general matters in broader environmental impact statements or environmental assessments (such as national program or policy statements) with subsequent narrower statements or environmental analyses (such as regional or basin-wide program statements or ultimately site-specific statements) incorporating by reference the general discussions and concentrating solely on the issues specific to the statement subsequently prepared.

[FR Doc. 2019–28106 Filed 1–9–20; 4:15 pm]

BILLING CODE 3225–F0–P